2015 No. 2 N/ M BERBICE

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL AND INHERENT JURISDICTION

In the matter of an application by BHARRAT JAGDEO for Writs/ Orders of Certiorari and Prohibition.

The Honourable Justices Navindra A. Singh, Puisne Judge

Mr. Murseline Bacchusfor the Applicant

The Attorney General represented by Ms. Prithima Kissoon for the Respondent,Magistrate Charlyn Artiga

Delivered December 11th 2015

RULING

The undisputed precursory facts to this Motion are that on April 20, 2015 Christopher Ram , a civilian citizen, swore to an Information, (it is noted that this is not actually reflected on the Information on the Magistrates' Court record), thereby instituting private criminal proceedings against the Applicant, Bharrat Jagdeo, charging the Applicant with an offence contrary to **section 139 D (1) (a) of the Representation of the People Act, CAP 1:03 of the Laws of Guyana**.

Upon his appearance at the Whim Magistrates' Court, the Applicant, through his Attorneys-at-Law submitted to Magistrate Artiga that the Particulars of Offence articulated in the Information did not disclose the offence charged and therefore the Court did not have jurisdiction to inquire into the charge.

Magistrate Artiga overruled the submissions and adjourned the matter to June 22, 2015 to begin a preliminary inquiry into the charge. On that date no evidence was taken and the matter was again adjourned to July 13, 2015.

This Motion was then instituted on June 26, 2015 seeking a Writ of Certiorari quashing the decision of Magistrate Artiga to overrule the aforementioned submissions made by the Applicant's Attorneys-at-Law and a Writ of Prohibition prohibiting Magistrate Artiga from taking any further steps in the said matter on the ground that she has no jurisdiction to so do.

The first issue that arises for determination is whether the Magistrate's ruling can be reviewed at this stage of the preliminary inquiry.

The underlying object of the writ of *certiorari* is to keep all subordinate courts and inferior tribunals within the limits of their jurisdiction; and if they act in excess thereof, their decisions can be quashed by superior courts by issuing this writ. (V. G. Ramachandran's Law of Writs, fifth edition (1993) @ pg. 720).

Matthew Bacon states in A New Abridgement of the Law (7th ed.), Vol. 2 pp. 9 - 10;

"*A certiorari is an original writ issuing out of the Chancery or the King's Bench directed in the King's name, to the judges or officers of inferior courts, commanding them to return the records of a cause* ***pending*** *before them, to the end the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause.*"

Also succinctly put by Atkin L.J. in **R *v* Electricity Commissioners (1924) 1 KB 171; (1923) All ER 150**;

"*Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.*"

The Applicant herein applies for a writ of *certiorari* on the ground that the Magistrate's decision to overrule the submissions *in limine* that the particulars of offence stated in the information does not support the offence with which he is charged is unreasonable and irrational.

If, in fact, the particulars of offence stated in the information does not support the offense charged then the Magistrate would not have jurisdiction to conduct a preliminary inquiry into the charge.

Want of jurisdiction can arise from the absence of some essential, preliminary or collateral fact which is a condition precedent to the assumption of jurisdiction by a subordinate court.

It is well settled that a court cannot by a wrong decision regarding a jurisdictional fact confer upon itself jurisdiction which it does not otherwise possess. Further, the court cannot confer upon itself jurisdiction that it does not possess by erroneously presuming the existence of a jurisdictional fact. [See **Raja Anand *v* State of U.P. AIR 1967 SC 1081**.

It is also well settled that *certiorari* is an appropriate process to raise the question of jurisdiction.

In our own local case, **Macadeen Ameerally and Aubrey Bentham *v* Attorney General, Director of Public Prosecutions and Magistrate Prem Persaud [1978] 25 WIR 272 @ 279**, Chancellor Haynes reviewed the use of *certiorari* through the case law and found "*The courts did not allow technicalities of procedure to bar the use of this remedy, such as whether there was a formal record or not or a final adjudication or not.*"

Assuming that at the end of the preliminary inquiry the Magistrate commits the Applicant to stand trial for the offense at the assizes, the Applicant would be perfectly entitled to apply

(whether it is granted or not is irrelevant) for a writ of *certiorari* to quash the committal at that time on the ground that the Magistrate had no jurisdiction to conduct the preliminary inquiry.

As far back as **Ameerally and Bentham op cit @ 279**, Chancellor Haynes stated "*It seems then today that certiorari would be to quash a committal … if the information on which it is founded is in law a nullity and the whole investigation without jurisdiction.*"

If it is that the Applicant is saying that the Magistrate has no jurisdiction to conduct a preliminary inquiry it can make no sense legally (or economically) to wait for the completion of the preliminary inquiry and depending on the Magistrate's decision then make this application.

If that is the case, the Applicant may as well await the outcome of a trial at the assizes should he be committed to stand trial by the Magistrate, since even a conviction can be quashed if the information that initiated the charge did not give the Magistrate jurisdiction to conduct a preliminary inquiry.

If the information does not disclose an offence, then it is a nullity in law and any preliminary inquiry conducted by the Magistrate will be without jurisdiction.

Good sense dictates that the best time to have such an issue determined is before the taking of evidence at the preliminary inquiry, particularly since the issue has been raised *in limine* before the Magistrate and denied.

There is no good reason based in law or otherwise why the Magistrate's ruling should not be reviewed immediately after it is issued.

In the circumstances this court finds that the Magistrate's decision is reviewable at this stage by *certiorari.*

The second issue that arises is whether the charge is fundamentally defective in that it does not disclose an offence and therefore incapable of yielding a valid and legal conviction.

In examining this issue it must be remembered that the rule is that penal statutes must be construed strictly since we must be assured that a just legislature will not decree punishment without making clear what conduct incurs the punishment.

Chief Justice John Marshall explained it this way in **United States *v* Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)**:

"*The rule that penal laws are to be construed strictly … is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime and ordain its punishment*"

In this light an examination of the section under which the Applicant has been charged must first be examined to determine what constitutes the crime that the Applicant has been charged with, in other words, what are the elements of the crime that the informant must prove to the Court in order to yield a valid conviction.

The Court will then determine whether each and every one of those elements is supported by the facts stated in the Particulars of Offence.

Section 139 D (1) (a) of the Representation of the People Act, CAP 1:03 of the Laws of Guyana provides, as is relevant to this Motion:

Any person who makes or publishes any statement which results or can result in racial or ethnic hatred among the people shall be liable on conviction …

The first element of the offence is the making or publishing of a statement, which, without any extensive analysis of thefacts stated in the Particulars of Offence it can be seen that this element is provided for, that is, that the Applicant did make or publish statements.

The next element of the offence is that such statements resulted or could have resulted in racial or ethnic hatred among the people.

In order to examine this element we must first determine what is racial or ethnic hatred and as correctly submitted by Counsel for the Respondent the plain meaning rule ought to be applied.
In explaining the plain meaning rule, Lord Reid in **Pinner *v* Everrett [1969] 1 WLR 1266 @ 1273**, stated;

"*In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural and ordinary meaning of the words or phrase in its context in the statute.*"

Also elegantly stated by Judge of the Supreme Court of the United States, Justice Antonin Scalia in **Reading Law: The Interpretation of LegalTexts [2012] @ pg. 69**;

"*The ordinary meaning rules the most fundamental semantic rule of interpretation. It governs constitutions, statutes, rules and private instruments. Interpreters should not be required to devise arcane nuances or to discover hidden meanings.*"

In that light let us examine the plain meanings of the words used in the statute.

"**Race**" is defined is defined in The Free Dictionary as one of the group of populations regarded as constituting humanity. The differences that have historically determined the classification into races are predominantly physical aspects of appearance that are generally hereditary. By limiting the criteria to such traits as skin pigmentation, colour and form of hair, shape of head, stature and form of nose, most anthropologists historically agree on the existence of three relatively distinct groups: the Caucasoid, the Mongoloid and the Negroid.

These classifications are in reality social classifications and not biological for the simple reason that there is no genetic characteristic possessed by all person of one race that is not possessed by persons of any other race, for example, by **all** caucasians that is not possessed by non-caucasians.

In the context of Guyana on a more relaxed, less scientific classification, it is said that Guyana has six races, namely, the Amerindians, the Europeans, the Africans, the Portuguese, the Chinese, and the East Indians. These, as a matter of classification, are in fact ethnic classifications.

"**Racial**" is defined as arising from or based on differences among human racial groups; for example racial discrimination.

"**Ethnic**" means, of, relating to, or characteristic of a group of people sharing a common cultural or national heritage and often sharing a common language or religion

"**Ethnicity**" is the state of belonging to a social group that has a common national or cultural tradition.

"**Hatred**" is defined as the emotion of intense dislike.

In the local parlance of Guyana, the word "coolie" is understood to refer to persons of East Indian descent, more of an ethnic than a racial classification, however, the lines of distinction between race and ethnicity may be said to be blurred in Guyana and as such the elements of "racial hatred" and "ethnic hatred" can be considered together.

Bearing this in mind, the second element would be that the statement resulted or could have resulted in persons of one race or ethnicity feeling an intense dislike for persons of another race or ethnicity.

The first statement that is alleged to have been made by the Applicant stated in the Particulars of Offence is "*The Opposition consistently shout about racism of the P.P.P. but they practice racism.*"

Without any further particulars a race or an ethnicity cannot be attributed to "*The Opposition*" or the "*P.P.P.*"

Even if a specific race or ethnicity of these groups can be established by evidence, which is doubtful, that would not change the fact that the charge would be defective with respect to this statement since it does not disclose any facts that establishes that second element.

The second statement that is alleged to have been made by the Applicant stated in the Particulars of Offence is "*The Opposition beat drums at six in the morning and say let us throw out these coolie people.*"

Without any further particulars a race or an ethnicity cannot be attributed to "*The Opposition*" much less a race or ethnicity different from "coolie people".

Even if a specific race or ethnicity of "*The Opposition*" can be established by evidence, which is doubtful, that would not change the fact that the charge would be defective with respect to this statementsince it does not disclose any facts that establishes that second element.

It is clear that the Particulars of Offence does not disclose an offense. Based on the foregoing analysis, even if what is alleged in theParticulars of Offence is proved there can be no resulting conviction since no criminal offence is disclosed.

The Applicant in making the statements, for those statements to constitute an offence as charged in the information, must be shown to be calling for, supporting or encouraging the hatred of one group by another on race or ethnicity.

The Court does no find that the Particulars of Offence have disclosed such facts.

This is an essential, preliminary or collateral fact which is a condition precedent to the assumption of jurisdiction by a subordinate court that is missing and, as stated above, the court cannot by a wrong decision regarding a jurisdictional fact confer upon itself jurisdiction which it does not otherwise possess.

This is a fundamental defect which cannot be remedied since to amend the Particulars in this Information to remedy that defect would be to allow a charge to be disclosed where there was previously no charge and that is not allowed.

An amendment does not authorize the transformation of an Information which on the face of it discloses no offence into one disclosing an offence [See **R *v* Gray [1965] 8 WIR 270** and **Harper *v* Prescod [1967] 11 WIR 183**].

It has been submitted on behalf of the Applicant that the Applicant was merely reporting the actions of other persons and therefore even if the statements disclosed in theParticulars of Offence were capable of resulting in racial or ethnic hatred, it is not the Applicant who would have been liable for the offence.

Counsel for the Respondent submitted that the Applicant's statements are governed by **Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination** which Guyana ratified on February 15, 1977.

It can only be assumed that Counsel for the Respondent is submitting that **Section 139 D (1) (a) of the Representation of the People Act, CAP 1:03** is the legislation pursuant to**Article 4** of **ICERD**. The Court does not find that that is in fact so.

Article 4 of **ICERD** specifically addresses the dissemination of ideas or theories based on the superiority of one race or group of persons of one ethnic origin. In any event the Court does not find that this is applicable or relevant to the facts before it.

It is nevertheless noted that**Article 4** of **ICERD** has actually come under fire since it is not clear whether it contains a requirement of intent. This was demonstrated by the European Court of Human Rights ruling in **Jersild *v* Denmark; Application no. 15890/89 (1994)** in which the Court's judges cite different interpretations of the provisions.

It is noted that the court in that case found a violation of the right of freedom of expression where a journalist was convicted for having broadcast the racist statements of others.

Subsequent to this in a joint statement the UN, OSCE and OAS set out a number of conditions which hate speech laws should respect which includes;

- No one should be penalized for statements that are true.
- No one should be penalized for the dissemination of hate speech unless it is shown that they did so with the intention of inciting discrimination, hostility or violence.

In fact several established democracies have entered reservations against **Article 4** of **ICERD** including Australia, the United Kingdom and the United States.

In legislating against such events due attention should be paid to the fact that Guyana also ratified the **International Covenant on Civil and Political Rights** on February 15, 1977 which requires an intent to promote hatred.

The Court has used this opportunity to remind the legislature the need to safe guard the freedom of expression as recognized under international law however, for the reasons discussed above, that is, that the statements recited in the Particulars of Offence do not disclose any offence, the issue of intent and whether it is an element that has to be proven in proving this offence is not an issue in this case.

Counsel for the Respondent submits that the Court should consider the fragile ethnic social structure of Guyana and the circumstances surrounding the making of the statements, however, such considerations are only applicable to a trial, for the tribunal of fact to consider if the evidence so permits.

At this stage, in this application, the Court is concerned solely with whether, as a matter of law, an offence is disclosed on the face of the information thereby giving the Magistrate jurisdiction to conduct a preliminary inquiry.

In the circumstances, based on the foregoing, the rules nisi of Certiorari and Prohibition granted by the Honourable Justice W. Ramlal on the 26th day of June 2015 are hereby made absolute.

There is no order as to costs since the Court recognizes that the genesis of this matter was the institution of a private criminal charge which the State had no conduct or control over.

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Justice N. A. Singh