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Privy Council Appeal No. 27 of 1989

Ponsamy Poongavanam *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF CRIMINAL APPEAL OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH APRIL 1992

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD BROWNE-WILKINSON

*[Delivered by **Lord Goff of Chieveley**]*

On 28th March 1987 the appellant, Ponsamy Poongavanam, was convicted of murder. He had been tried before Judge Pillay and a jury of nine men, and had been convicted by the unanimous verdict of the jury. The mandatory death sentence was then imposed. He appealed to the Court of Criminal Appeal of Mauritius, the grounds of his appeal relating to a number of alleged misdirections and other failures on the part of the trial judge. On 30th July 1987 the Court of Criminal Appeal dismissed his appeal, rejecting all the submissions advanced on his behalf.

The appellant now appeals to Her Majesty in Council, relying on only one point which was not taken in either of the courts below, which is that his conviction should be quashed because his trial was unconstitutional having regard to the constitution of the jury.

To consider this submission, it is necessary first to set out the material provisions of the Constitution of Mauritius. They are as follows:-

" CHAPTER I - THE STATE AND THE CONSTITUTION

1. The State

[13] Mauritius shall be a sovereign democratic State.

2. Constitution is supreme law

This Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

CHAPTER II - PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

3. Fundamental rights and freedoms of the individual.

It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms -

(a) the right of the individual to life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression, of assembly and association and freedom to establish schools; and

(c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation,

and the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. ...

10. Provisions to secure protection of law.

(1) Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. ...

16. Protection from discrimination.

(1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect. ...

(3) In this section, 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description. ..."

The trial of the appellant was conducted in accordance with section 42(2) of the Courts Act of Mauritius, which provides that "Criminal trials before the Court of Assizes shall be held by and before one or more Judges and for the trial of matters of fact there shall be a jury consisting of 9 men qualified as provided in the Jury Act". The jury panel was summoned for the particular Session of Assizes in accordance with sections 19 and 20 of the Jury Act from among the names transcribed in the jury book for the year 1987-88, in accordance with section 19(2) of the Act which provides that "The Registrar shall, in summoning the first panel of jurors under this Act for the first juror in that panel, take the first name appearing in the list under letter A, for the next juror the first name appearing in the list under the letter B, and so on ...". The particular jury which tried the appellant was selected from the jury panel by random selection, the officer of the court drawing in open court from a box containing separate pieces of paper bearing the names of jurors until the names of nine men were chosen who were not objected to or challenged. In point of fact, the appellant challenged peremptorily four jurors and the prosecution one juror, and the judge excused two other jurors on cause shown.

The qualifications for jury service in Mauritius are set out in section 2 of the Jury Act, which at the material time provided as follows:-

"Every male citizen of Mauritius who has resided in Mauritius at any time at least one full year, and who is between the ages of 21 and 65, shall be qualified and liable to serve as a juror where -

(a) he possesses immovable property situate in Mauritius, of the value of at least 500 rupees per annum;

(b) he possesses a clear personal estate of the value of least 5,000 rupees;

(c) he pays a yearly rent of at least 480 rupees; or

(d) he is in receipt of or entitled to a salary or income of 960 rupees per annum, whether the

> agreement of service is by the year or otherwise and has been in receipt of that salary for 6 months at least before making the declaration mentioned in section 6."

It follows that at that time women were excluded from jury service. This exclusion has more than once been defended by the Supreme Court of Mauritius on the ground of social conditions prevailing in Mauritius (see *Jaulim v. D.P.P.* [1976] M.R. 96 and *Peerbocus v. R.* (Supreme Court Judgment No. 212 of 1991 delivered on 25th June 1991). However, by the Jury (Amendment) Act 1990, women were rendered eligible for jury service, though their Lordships were informed that, following the coming into force of that Act, only a handful of women have come forward for jury service. By the same Act, the financial qualifications for jurors were also abolished, but it was accepted before their Lordships that economic changes in Mauritius had already rendered these qualifications of negligible importance (see, e.g., the judgment of the Court of Criminal Appeal in *Peerbocus v. R.*). It was further accepted by the respondent before their Lordships that no person from the Island of Rodrigues or the outer islands has ever made a declaration of qualification to serve as a juror, and that the clerk of the court of Rodrigues has never, since the setting up of the court, submitted any list of jurors; but their Lordships were informed that to summon jurors from those islands would create serious practical difficulties, having regard to problems relating to the service of the summons, travel and the provision of accommodation pending trial.

It is against this background that their Lordships turn to consider the submissions advanced on behalf of the appellant. These were to the effect that (1) the exclusion at that time of women from jury service was contrary to sections 3 and 16 of the Constitution, which outlaw discrimination by reason of sex; (2) there was a breach of section 10 of the Constitution in that, by reason of (a) the then financial qualifications in section 2 of the Jury Act, and/or (b) the fact that the jury list for 1987-88 contained only 4,000 names, although over 176,000 persons were then recorded as being employed and over 46,000 were recorded as paying income tax in that year, and/or (c) the exclusion in practice of any jurors from the Island of Rodrigues and the outer islands and/or (d) the exclusion of women from the jury, the appellant was not afforded a fair hearing by an impartial court established by law. On this basis, it was submitted that the constitution of the jury was unlawful and that the appeal of the appellant should be allowed and his conviction quashed.

Their Lordships turn first to the submission that the exclusion of women from juries in Mauritius was contrary to section 3 or section 16 of the Constitution. They consider first section 16. Section 16(1) provides that "Subject to subsections (4), (5) and (7), no law

shall make any provision that is discriminatory either of itself or in its effect". This prohibition however depends on the meaning of the word "discriminatory", which is defined in section 16(3) so as to exclude discrimination on the ground of sex. Since such discrimination is expressly referred to in section 3, it is evident that the exclusion in section 16 is deliberate, from which it follows that it cannot be said that the provision in the Jury Act for all male juries is contrary to section 16. It is true that section 3 provides that the human rights and fundamental freedoms there specified shall exist without discrimination by reason of a number of matters including sex; and among the human rights and fundamental freedoms so specified is the right to protection of the law. Accordingly under section 3 the appellant was entitled to the fundamental right of protection of the law, as provided in section 10, without himself suffering any discrimination on the grounds of sex. Here however he has suffered no such discrimination, and it follows that he can have no complaint under section 3.

Their Lordships turn therefore to section 10(1) which requires that the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. It appears to their Lordships that the strongest way in which the point could be put in favour of the appellant is that, where the trial takes the form of a trial by jury, for the court to constitute an impartial court within the section it is not enough that the court should be free of actual bias or even an appearance of bias; it must also be a jury which is drawn from a list which provides the accused with a fair possibility of obtaining a jury which constitutes a representative cross-section of the community.

In considering this question, their Lordships turned first to the jurisprudence of the European Court of Human Rights, because section 10(1) appears to mirror the words of Article 6(1) of the European Convention. However, they have found nothing directly in point. The cases which they have considered (*Eur. Court H.R., Piersack judgment of 1 October 1982, Series A no. 53, Euro. Court H.R., Sramek case, decision of 26 January 1984, Series A no. 84* and *Euro. Court H.R., Hauschildt case, decision of 26 September 1988, Series A no. 154)* appear to be directed towards allegations of bias, or apparent bias, in a judge who is a member of the court. This is perhaps not surprising, since juries appear to be the exception rather than the rule among those States which are parties to the Convention; moreover it may be the case that, in those States where there are juries, those juries are normally, if not always, drawn from lists which do provide a fair possibility of a representative jury, in which event the point could not arise before the European Court of Human Rights.

Their Lordships then turned to the relevant case law in the United States. Cases cited to their Lordships in the course of argument appear to show that a principle is well recognised in the United States that the jury must be drawn from a list which is representative of society. This was expressed in the opinion of the Supreme Court in *Thiel v. Southern Pacific Co.* 328 U.S. 217 (1946), in which it was said (at page 220):-

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community ... This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

Where there has been a breach of that principle, convictions have been quashed on the motion of appellants who have invoked the Sixth and the Fourteenth Amendments to the Constitution of the United States. Furthermore, in the years since the 1939-45 war, it has become established that the exclusion of women from jury lists will mean that the lists are not representative in this sense. This development appears to have culminated in the decision of the Supreme Court in *Taylor v. State of Louisiana* 419 U.S. 522 (1975).

Whether any such broad principle can be derived from section 10(1) of the Constitution of Mauritius depends upon the construction to be placed upon the word "impartial" in that section. On the natural meaning of the words of the section, the provision is directed towards the actual tribunal before which the case is heard, and the hearing before that tribunal; and the introduction of the word "impartial" is designed to ensure that the members of that tribunal are not only free from actual bias towards the accused but also, as the European jurisprudence shows, manifestly so in the eyes of the accused. The American principle however transcends such requirements. It is directed not to impartiality in the ordinary meaning of that word, but to the representative character of the list from which the jury is to be drawn. The effect is therefore that, however impartial the actual jury may in fact have

been, the principle may nevertheless be offended against if those from whom the jury are selected are not representative of society.

Furthermore, the principle is not directed towards the constitution of the particular jury in question. It is recognised that it is impossible to achieve, by the process of random selection, a representative jury; indeed if the aim was to achieve a representative jury, this could only be done by interference with the process of random selection which itself would not only be open to abuse, but however fairly done could be suspected of abuse, and could never in fact achieve a jury truly representative of all sections of society. This is no doubt why the American principle looks rather to the lists from which individual juries are drawn, and requires that those lists shall be compiled from a fair cross-section of society. This makes it all the more difficult to derive the principle from a provision such as section 10(1) of the Constitution of Mauritius, which is concerned rather with the actual tribunal by which the case is tried, and with the impartiality of that tribunal. Whether the jurisprudence on Article 6(1) of the European Convention of Human Rights is likely to develop in that direction, is very difficult to foresee; but any such development would require a substantial piece of creative interpretation which has the effect of expanding the meaning of the words of Article 6(1) beyond their ordinary meaning.

Their Lordships have however come to the conclusion that, in the present case, it is unnecessary for them to answer that question of interpretation in relation to section 10(1) of the Constitution of Mauritius. Their Lordships take first the submissions of the appellant other than those which relate to the exclusion of women from jury service. These are concerned with, first, the financial qualifications in the Jury Act; second, the relatively small number of names on the jury lists; and third, the exclusion in practice of jurors from the Island of Rodriguez. Their Lordships do not consider that there is any substance in any of these points. As to the financial qualifications, as already recorded, their Lordships were informed that these had become of negligible importance. In these circumstances, it is difficult to imagine how these qualifications could be of any relevance. Certainly, before any point could sensibly be pursued with regard to these qualifications, it would have to be on the basis of full evidence, in proper form, substantiating the factual basis upon which it could be said that the then negligible financial qualifications had any relevant impact upon the constitution of juries in Mauritius. No such evidence was available to their Lordships in the present case. The same applies to the relatively small numbers of persons whose names, their Lordships were told, were on the jury list. Their Lordships have no means of ascertaining why this was so, or of evaluating

the impact, if any, of this fact upon the constitution of juries. As far as persons from the Island of Rodriguez are concerned, there was no evidence before their Lordships suggesting that their absence would have any relevant impact upon the constitution of juries, and in any event the practical difficulties to which their Lordships referred could well provide an objective justification for this particular exception.

Their Lordships turn finally to the exclusion of women from juries, and the claim that this resulted in a breach of section 10(1) of the Constitution in the case of the appellant. In this connection, they wish to refer to a passage from the opinion of the majority of the Supreme Court in *Taylor v. State of Louisiana* 419 U.S. 522 (1975), delivered by White J., who said (at page 701):-

> "Accepting as we do, however, the view that the Sixth Amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male. To this extent we cannot follow the contrary implications of the prior cases, including *Hoyt v. Florida* 368 U.S. 57 (1961). If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed. If at one time it could be held that Sixth Amendment juries must be drawn from a fair cross section of the community but that this requirement permitted the almost total exclusion of women, this is not the case today. Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place. Nothing persuasive has been presented to us in this case suggesting that all-male venires in the parishes involved here are fairly representative of the local population otherwise eligible for jury service."

It appears to their Lordships that this observation has some bearing upon the present case. Let it be assumed for present purposes that the word "impartial" in section 10(1) of the Constitution of Mauritius can be read sufficiently broadly to import the American principle. Even so, their Lordships would here be concerned with the question whether, in March 1987, when the appellant was convicted, the exclusion of women from the jury list in Mauritius could at that time be objectively justified having regard to the social circumstances then prevailing in that country. On this question, they have the benefit of two judgments of the Supreme Court of Mauritius, in which the exclusion of

women from juries was defended on social grounds. In *Jaulim v. D.P.P.* [1976] M.R. 96, the following passage is to be found in the judgment of the Court of Criminal Appeal (Sir Maurice Latour-Adrien C.J., Garrioch S.P.J. and Rault J.) at page 101:-

> "The second question will relate to the justifiability of the differentiation between men and women in the matter of jury service. Judicial notice may, we think, be taken of the fact that there existed at the time the impugned provisions were enacted and that there have long existed since then, and we have no evidence for holding that there do not still exist, a number of factors which could and may be legitimately invoked in favour of such differentiation, and which all pertain to the condition of women not only generally but also in the special context of the Mauritian community. The framers of those laws may have thought and may still think that the Mauritian woman's status, her place and role in the home and family, and social conditions prevailing in this country are incompatible with a service which, as our law has stood and still stands, may require that they be kept away from home for sometimes long periods, sleeping in hotels, and unable to move about except under the vigilant eyes of court ushers. It seems unquestionable to us that such an obligation would cause much distress to many Mauritian women, and arouse a deep resentment among many of their male relatives. Those circumstances would provide, in our judgment, an objective and reasonable justification, if any was needed, for the distinction made by the impugned legislation."

This approach was followed by the majority of the Court of Criminal Appeal (Sir Victor Glover C.J., and Boolell J.) in *Peerbocus v. The Queen supra*, where it was recorded that in Mauritius the emancipation of women on a sizeable scale was a relatively recent phenomenon. Moreover, consistently with the opinion expressed in those cases, it was not until 1990 that, by the Jury (Amendment) Act of that year, women were rendered eligible for jury service, and it appears that, since the Act came into force, women are only slowly coming forward for jury service.

In the face of this body of opinion, expressed by those who are far better qualified to speak on the matter than their Lordships, it would in their Lordships' opinion be quite wrong for them to hold that by 1987 the time had come when, if the American principle is here applicable, it could properly be held by this Committee that there was no longer any objective justification for the exclusion of women from jury lists in Mauritius, having regard to the social conditions prevailing in that country. On the contrary, their Lordships prefer on a matter such as this to be guided by opinions expressed by senior judges of the Supreme

Court of Mauritius; and they can see no basis for concluding that, before the enactment of the legislative change in 1990 (which appears if anything to have been promoting rather than following a change in public opinion on the matter) the exclusion of women from juries in Mauritius had ceased to have objective justification.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed.