

Police v Soodhun & Ors

2015 INT 5

**IN THE INTERMEDIATE COURT OF MAURITIUS
(Criminal Division)**

In the matter of :-

C.No.1151/2010

Police v

- 1. Showkutally SOODHUN**
- 2. Beejaye SOMAI**
- 3. Maheswarsingh KHEMLOLIVA**

J U D G M E N T

The abovenamed Accused parties are variously and severally charged on an information containing three counts as below. The offences are alleged to have taken place on 2 May 2009 at about 2.00 pm at Brown Séquard Street, Port Louis, more especially in front of the office of “L’Express”, a daily newspaper published in Mauritius [hereinafter referred to as “L’Express”] and Radio One, a radio station broadcasted in Mauritius [hereinafter referred to as “R1”], with both offices found at La Sentinelle Building.

- **Count 1 - Accused No.1/Soodhun** is charged with having *held a public gathering*, namely a *public meeting* without having given written notice to the Commissioner of Police not less than 7 clear days before the gathering was to be held, in breach of sections 3(1),(6) and 18 Public Gatherings Act [hereinafter referred to as “PGA”],
- **Count 2 - Accused No.1/Soodhun** is charged with *using threatening words at a public gathering*, namely a *public meeting*, amongst others, the following :” ... *to na pas fane caca ... to pas grate le dos malheur mo dire li na pas grate le dos malheur ... zordi c’est juste ene réclame, film la pu joué plutard ... mo pou donne zotte dernier warning ajordi enough is enough ...*”, in breach of sections 10 & 18 PGA,
- **Count 3 - Accused No.2/Somai and Accused No.3/Khemloliva** are charged with *taking part in an unlawful assembly and that whilst being*

assembled, they conducted themselves in such manner as was likely to provoke a breach of the peace in breach of section 139(1)(2)(b) Criminal Code [hereinafter referred to as "CC"].

Accused parties have pleaded **Not Guilty** to their respective charges. Mr G.Glover S.C appears for Accused No.1/Soodhun, Mr R.Yerigadoo and Mrs R.Jadoo appear for Accused No.2/Somai and No.3/Khemloliva. Messrs J-M Ah Sen and M.Armoogum appear for the Prosecution.

The gist of the case for the Prosecution is as follows :-

At the material time, Accused No.1/Soodhun was a member of the Legislative Assembly and a well-known figure in the Mouvement Socialiste Militant political party [hereinafter referred to as "MSM"] and Accused No.3/Khemloliva was the Mayor of the town of Quatre-Bornes.

On the relevant day and time, the attention of photo reporters, Ms Beezadhur and Mr Etienne who were at work at L'Express, was drawn by various sounds and they went outside on the balcony to see what was going on.

Ms Beezadhur saw Accused No.1/Soodhun addressing a hostile crowd of about 100-150 persons with a hand-held loud speaker - some participants wearing orange tee-shirts [the Court takes judicial notice that the colour 'orange' is the MSM official party colour], some were burning copies of L'Express newspaper and she heard disparaging comments against the editor and director of L'Express as regards the crowd estimate at the MSM political rally on Labour Day 1 May 2009. Thereafter a glass door was smashed sending shards in her direction.

Ms Beezadhur filmed scenes of the meeting on a 30-minute long DVD and clicked various photos – see *Photos F1-F16*. Mr Etienne clicked numerous digital photos. Ms Beezadhur thereafter edited the DVD to about 7-8 minutes of visual image and remitted same to the police on a CD.

Mr Etienne deposed that he saw a crowd of 100-125 people. According to him, the signs and banners commented upon L'Express crowd-estimate of the 1 May political rally. He then took several photos from various angles and remitted 92 photos to the police – see *Photos D1-92*.

PS Mosaye of the Divisional Support Unit who had been present at the locus is said to have reported the incident to the police.

After viewing the DVD and photos remitted to the police, DI Nutchetrum proceeded with the arrest of the 3 Accused parties who were identifiable thereon. An audio cassette was made of the DVD to facilitate audio transcription and the National Security Service ["NSS"], which is a branch of the police force, was requested to draw up an official transcript - see *Doc E* [hereinafter referred to as the "*NSS transcript*"].

All the photos, DVD film/*Exhibit 1*, VHS audio cassette from which the NSS transcript was made, NSS transcript and defence statements are on record.

The presence of the Accused parties on DVD and photos is not disputed by the defence.

DI Nutchetrum identified all three Accused parties as per DVD and photos. Accused No.1/Soodhun was seen on the DVD addressing a crowd with a hand-held loud-speaker for about a minute. Accused No.2/Somai was seen wearing a black shirt, holding a sign and burning newspapers on the road – see *Photo D14* [and *Photo F16*]. Accused No.3/Khemloliva, in an orange tee-shirt, is seen holding a burning newspaper in his right hand and a sign in his left hand - *Photo F 14*. Accused No.1/ Soodhun was known to him as a member of the Legislative assembly and Accused No.3/Khemloliva as Mayor of Quatre-Bornes.

The case for the prosecution was closed and the defence followed suit without any evidence being adduced on behalf of the Accused parties.

For ease of reference, the gist of their respective unsworn defence statements are reproduced below:-

Accused No.1/Soodhun's main defence statement dated 4 May 2009 - Doc C1 is as follows :-

At the material time, he was the President of MSM and he and party officials had organized the 1 May Labour Day's rally, which was reported in the press on the next day/ the day of the incident. On the next day, Saturday 2 May 2009 at about 1.15 pm, he was at his Grand Baie bungalow when he received a call that there was a crowd in front of Sun Trust building voicing out their discontent at L'Express' estimate of the crowd that had attended the MSM's Labour Day rally.

He felt that it was his duty to go and see what was going on and drove to Port Louis where at Sun Trust Building he saw a crowd with their flags and other political figures of the party. He then came to know that another group had already left for Brown Séquard Street. He walked there in order to prevent anything going wrong which would in turn bring disrepute to the party. At R1 building which also housed the L'Express Offices, he came across activists chanting slogans such as " Arrête publie fausse nouvelle", amongst others. He tried to calm things down but since it was very noisy, he could not make himself heard and had to resort to the use of a hand-held loud speaker to exhort the crowd not to create any trouble, to disperse and that he would follow-up the situation at party-level, but in vain.

It was later on, through the press, that he came to know that L'Express's entrance door had been smashed. He continued calming the group of 10 people who were shouting, after which the group dispersed and he left.

*Should a reporter have said that he had witnessed the following, it is **denied** that* –

- *he ever led a marching group from Brown Séquard Avenue to La Sentinelle building;*
- *that there was approximately a group of 150 people with MSM flags and signs printed with negative slogans against L'Express such as " Arrête marginalize nou parti MSM", "Pas cause menti", "L'Express arret publier faussete", "Pas Le journaliste magouilleur";*
- *that those persons tried to enter La Sentinelle building to put fire to it;*
- *that a person from the group was seen pulling at a "R1" banner and setting same alight;*
- *he was ever heard speaking though a hand-held loud-speaker and saying "Arrête acheter Journal L'Express" and that L'Express had published that 4,000 persons had attended the meeting on the eve when in fact there had been 20,000.-;*
- *that he had ever menacingly stated "Zordi réclame, film la pou jouer plitard" and that L'Express newspapers were burnt.*

It is denied that he had ever uttered those words, or that he had witnessed those incidents. Everything occurred as he explained. As then Acting President of the party, he had not been aware of the manifestation on the material day and at party-level there had been no decision to organize such protests against Sentinelle Group as regards their underestimate of the crowd.

It is stated that the group of 10 persons in front of 'LExpress were not identifiable and he did not notice any member or office bearer of his political party at that spot either.

*In his defence statement dated 19 July 2010/ **Doc C**, where the charge of holding an unauthorized gathering is put to Accused No.1/Soodhun, as well as*

the charge of disorderly conduct and use of threatening words, he stated that it was a false charge and that he had already explained the matter in his previous statement.

And as per **Doc C2**, Accused No.1/Soodhun was formally identified as being a person addressing the crowd with a hand-held loud-speaker - without the words being recollected. He explained that he was trying to calm down the crowd.

The gist of **Accused No.2/Soimai's main defence statement dated 13 May 2009 - Doc A** - is as follows :-

On the material day, he intended to purchase a mobile phone and proceed to Champ-de-Mars. He came across a group of 7-8 unknown-to-him people holding signs walking in the direction of Immaculée Church. He was not aware of what was written on the signs but followed the group out of curiosity. They walked up to the Radio One building and stopped there and at that time he was not aware of the purpose of the group manifestation.

He remained as an onlooker in the vicinity of the church when at a certain point in time he saw a group of persons - unknown to him - shouting things he could not remember. The group increased to approximately 100 persons and an unknown man (whom he would not be able to identify) came up to him, with a sign (he did not know what was written thereon) and told him to hold the sign for a while until he returned. He acquiesced and remained at his spot as an onlooker. The unknown person never returned. He saw Accused No.1/Soodhun and another person whom he knew as being politicians telling the crowd to disperse, which eventually occurred.

He did not see anyone smashing the glass pane of L'Express' entrance door or conducting themselves in a disorderly manner. He stated that he did not form part of any illegal gathering and had only watched out of curiosity from afar.

Upon being informed that the police was in possession of photographs of him holding a sign, he conceded that he indeed was in possession of a sign at a certain point in time as explained above. He formally declined to look at the photos, reiterated that he had not participated in any illegal manifestation and opted for a face-to-face identification exercise should the need arise.

In **Accused No.2/Somai's 2nd statement dated 22 June 2009/Doc A2**, he was not formally identified by police officers as being part of the crowd on that day.

His **3rd defence statement dated 19 July 2010/Doc A3** is in denial of having participated in an illegal gathering in front of La Sentinelle building at Brown Séquard St, Port Louis and that he had therein conducted himself in a manner likely to cause a breach of the peace. And he added that he had explained what had occurred in his previous statement.

The salient points of **Accused No.3's main defence statement dated 13 May 2009/Doc B** are as follow :-

Upon being informed of the illegal gathering of 150 people with signs on 2 May 2009, at about 2 pm, in front of la Sentinelle Building, where there was use of a portable loud-speaker, an attempt to burn a banner of Radio 1 and to force a way through the L'Express Office thereby smashing a glass pane, Accused No.3 denied same and explained that at the material time he was at home [at Quatre-Bornes] and that he never came to Port Louis that day.

On 3 May 2009, he learnt that partisans of Mouvement Militant Mauricien [sic] had protested in front of R1 and was unaware why and which MSM partisans had done so. As member of the Central Committee of MSM, he was not aware of such illegal gathering.

Upon it being put to him that the police had reason to believe that he was the person dressed in orange, wearing dark glasses and bearing a sign "L'Express arête publie faussete" seen on the photos, he maintained that he was not at the locus that day and declined to look at the photos on the ground that he

did not know when same had been taken. He acquiesced to a face-to-face confrontation should the need arise and gave his mother's name as witness.

As per **Docs B1 & B2**, Accused No.3/Khemloliva was not formally identified by police officers. And in **Doc B3**, he formally denies ever conducting himself in such manner as was likely to cause a breach of the peace.

The Law

For ease of reference, the Court reproduces sections 3(1), 10, the definitions of 'public gathering', 'public meeting', 'public place' within the PGA, section 139 CC and the definition section of "unlawful assembly" under the CC:-

"public gathering" – means **a public meeting** or a public procession,

"public meeting" –

(a) means a meeting held or to be held in a public place;

(b) includes a meeting of school children, a sports meeting and a meeting for public entertainment, but

(c) does not include a meeting held exclusively for a religious purpose.

"public place" means any place in which the public has or is entitled or permitted to have access, whether on payment or otherwise.

"3. Notice of public gatherings

(1) Any person wishing to hold or organize a public gathering shall give written notice to the Commissioner not less than 7 clear days before the day the gathering is to be held or organized."

...

“10. Misbehaving at public gatherings

Any person who, at a public gathering uses threatening, obscene, abusive or insulting words or behavior, whether or not directed against any person, body or group of persons, shall commit an offence.”

Section 139 Criminal Code

139. Taking part in unlawful assembly

(1) Any person who takes part in an unlawful assembly shall commit an offence ...

(2) In this section and in the following sections “unlawful assembly” means 12 or more persons who -

(a) are assembled with intent to commit an offence; or

(b) being assembled even for a lawful purpose, conduct themselves in such a manner as is likely to lead to or provoke a breach of the peace.

Submissions

Mr Ah Sen submitted on behalf of the Prosecution that the elements as regards *Count 1 vis-à-vis Accused No.1/Soodhun* had been proved.

In support of the elements of “to hold” and “public gathering”, reference was made to the case of **DPP v Jundoosing** [\[1982 MR 117\]](#) and the **PGA** respectively.

It is the case for the Prosecution that as regards Accused No.1/Soodhun who actively participated in the gathering, the *ratio* in **Jundoosingh** [supra] was to be followed – all the more so as “... *there can be a holding* [of a public meeting] *without organizing ...*”. And that the PGA defines “**public gathering**” as “*public meeting or public procession*” and it cannot be disputed that the gathering/meeting *in lite* was held in public.

As regards *Count 2 against Accused No.1/Soodhun*, it is submitted by the Prosecution that having established the main element of “**public gathering**”, it was then incumbent on the Prosecution to demonstrate that “**threatening words**” were used - all the more so since the evidence as per the DVD was unchallenged.

Reference was made to the Oxford Dictionary meaning of ‘*threat*’ as being “... a statement of intention to inflict injury, damage or other hostile action as retribution ...” and the meaning of “*threaten*” as “... make or express a threat to (someone) or to do (something),...” and that same was consistent with the testimonies of Inspector Nutchetrum and Ms Beezadhur, who considered Accused No.1 as being the leader of the meeting.

As for *Count 3 against Accused No.2/Somai & No. 3/Khemloliva* - considered by the Prosecution as *active participants* as per the DVD and photos - having proved there was an unlawful public meeting, reference was made to **Archbold 2010** as regards the element of “breach of the peace” which is constituted “.... whenever harm is actually done or is likely to be done”. And, it is the contention of the Prosecution that the element of “*harm*” had been amply proved by the shattering of glass panes, newspapers being burnt, coupled with the possibility of further harm.

Mr Glover S.C submitted on behalf of Accused No.1/ Soodhun on the failure of the Prosecution to list/call as prosecution witnesses any of the police officers who might have witnessed the incident/s, emphasized that the DVD was an “*edited*” version and commented on the NSS transcript which was lacking in clarity and pervaded by inaudible pauses, thereby carrying the risk of the reader reaching an erroneous interpretation.

As regards *Count 1*, it is not disputed by the defence that Accused No.1/Soodhun was indeed present at the MSM partisans meeting but it is submitted that the Prosecution has not adduced any evidence to rebut the latter’s version as being untrue.

It was further submitted that since ‘*context*’ was a prime consideration, the only issue for the Court to consider was *whether Accused No.1 had indeed held a public meeting without giving prior notice*. Reference was made to the case of **T. Benyadin & Anor v The State [2012 SCJ 131]** which reaffirms the dicta in **Jandoosingh** [supra].

The Defence for Accused No.1/Soodhun submitted that –

- the fact that the latter was merely speaking to party partisans was *not* equivalent to holding of a public gathering within the parameters of section 3 PGA and/or that it was the latter’s intention to ensure that the meeting

kept going - to such extent that Accused No.1 was transformed into the “holder” of the meeting;

- that it had not been rebutted that Accused No.1 came to Port Louis with the intention to defuse the situation;
- that the edited DVD and the incomplete NSS transcript did not portray the full picture of the events,

hence the contention of the Defence for Accused No.1/Soodhun that the Prosecution had failed to prove Count 1.

As regards **Count 2, the Defence submitted** that the Prosecution has failed to prove its case in as much as the sole decisive issue for the Court was whether, *ex facie* the information, the words were of a “**threatening nature**”. Reference was made to the cases of **Coonjan v The Queen [1976 MR 137]** [which was on the aspect of “**abusive**” words addressed to the police] and **Mudhoo v State [2012 SCJ 411]**, the latter being a criminal code case, but nevertheless informative.

In the absence of a definition for the term “**threat**” within the PGA, reference ought to be made to the word’s ordinary dictionary meaning as per the Collins Dictionary, and compared with the words as per information taken in context with the testimony of PS Soobhug, who conceded that the transcription was not done properly in as much as there were certain words which were not clear. The point made by the Defence is, which part of the words as per Count 2 amount to *threat or* was it the case that all those words, taken out of context of the transcript, amount to threat.

Emphasis was laid on *certainty, clarity and context* and it was submitted that in the absence of the first two items, the Court could not objectively rely on the incomplete transcript in order to conclude that the words were *threatening* as per their ordinary dictionary meaning, all the more so since the purport of the words used may have different meanings if taken in/out of context and/or within the use of common Mauritian parlance. And that the words did not necessarily imply that there was imminent danger of harm/pain/misery being inflicted.

Mr Yerrigadoo submitted on behalf of Accused No.2/Somai & No.3/Khemloliva that the Court could not safely rely on the edited DVD or on the

photos produced in order to conclude that they had taken part in a [spontaneous] unlawful assembly – reference was made to the case of **State v Bacha [1996 MR]** and to the parameters of the admissibility of such evidence as per **Kajala v Noble [1982 75 Cr App R 149]**.

He further submitted that the Prosecution must establish that Accused parties Nos.2 & 3 “... *conducted themselves in such a manner as is likely to lead or to provoke a breach of the peace ...*” as per the enabling enactment and the principle in **F.A.G Beegun**

v The State [2014 SCJ 246]. And since the latter had not done so, the offence could not be proved against them and ought to be dismissed.

CONCLUSIONS

After perusal of the evidence on record and the submissions of counsel, the Court comes to the following conclusions which are to be read comprehensively:-

Admissibility of edited version of DVD & photos

Following arguments heard on the admissibility and authenticity of the above items, the Court ruled same as being admissible evidence on 13 September 2013. The Ruling is on record and the Court finds no reason to repeat its contents. The photos and the viewing of the DVD clearly show that there were more than 10 persons in the vicinity of L'Express at the material time. _

Prosecution Witnesses

The fact that no police officers who witnessed the events were called as prosecution witnesses hardly detracts from the credibility of civil Witnesses Etienne and Beezadhur who are considered as witnesses of truth and who witnessed the events and recorded same contemporaneously. And the same applies for DI Nutchetrum who subsequently examined the DVD and photos which had been remitted to him. Their combined testimonies are deemed by the Court as trustworthy versions and a true reflection of the events of that afternoon.

The NSS transcript

The Court considers that although the NSS transcript might contain some 'pauses', its content and tenor - taken in context of the prevailing situation - is abundantly clear in its (derogatory) terms. The NSS transcript drawn up by CI Soobhug who is deemed to be a witness of truth and who has no reason to lie or invent anything, is considered by the Court as a true and faithful transcript of the words uttered by Accused No.1/Soodhun at the meeting on the material afternoon.

Count 1 - “ holding a public gathering without having given written notice to the Commissioner of Police”

It is not disputed that Accused No.1/Soodhun was at some stage present at the meeting in front of L'Express and addressed the crowd.

(a) *The element/s of “holding” of a “public gathering/meeting”*

The issue of “*holding a meeting*” without having had to “*organize*” same was settled in **Jandoosing** [supra].

As per Accused No.1/Soodhun's defence statement version, there was a group of 10 amassed, disgruntled MSM activists who marched towards L'Express and it is part of his case that he intervened verbally to calm down the situation.

The Court is satisfied that the circumstances that followed and Accused No.1/Soodhun's address to the crowd of 150 persons - is equivalent to **holding** a

public gathering/public meeting and same was held without having given 7 days prior written notice to the Commissioner of Police.

The Court is entitled to take the contents of the NSS transcript into consideration and has done so. And the Court is satisfied that Accused No.1/Soodhun “held” “a public gathering” - within the **Jandoosing** [supra] and **Benydin** [supra] parameters and this for the following reasons:-

1. *Accused No.1/Soodhun was the main speaker,*
2. *addressing a crowd of approximately 150 people,*
3. *with a hand-held loudspeaker,*
4. *in front of L'Express - the impugned newspaper that had allegedly published erroneous figures of the crowd having attended the MSM Labour Day rally on the eve.*
5. *The tenor of his address to the crowd, as per the NSS transcript, far from being conciliatory - as he would have the Court believe as per his defence statement - verges on the inflammatory vis-à-vis L'Express and*
6. *the acts of burning of newspapers and smashing of glass panes are testimony of the tension-fraught situation at the meeting.*

Indeed, Accused No.1/Soodhun's words, acts and doings are clear, indicative and relevant as regards the **holding of a public meeting/public gathering in a public place** and his “... undoubted intention ... not to let the meeting go, to rivet its attention, to keep it together, to carry it on ... in order to further the purpose for which it was assembled ...” – see **Jandoosing** [supra].

The Court is satisfied that the Prosecution has proved Count 1 against Accused No.1/Soodhun.

Count 2 “ ... using threatening words at a public gathering...”

As per the observations of the defence, the Court deems it proper to restrain itself to the sentence/s reproduced as per Count 2 [see page 1].

Upon cross-reference with the NSS transcript, the Court observes that the sentence/s as per Count 2 do not follow each other as part of Accused No.1's 'address' to the crowd. This does not mean that the words have been taken out of context - as contended by the defence. And the Court further notes that the words "... **film la pou joué plutard...**" which appears in the sentences in Count 2, do **not** appear on the NSS transcript.

The fact that those words appear on Count 2 but not on the official transcript does not taint the charge and this in view of the purport of the *other* sentences in Count 2, albeit not following each other, but taken within context of the whole of Accused No.1/Soodhun's address at the meeting and the reason why such meeting was being held.

Though some might say that the words were within the realm of the permissibly distasteful for a protest meeting, it is the Court's opinion that by no stretch of verbal linguistics can the impugned sentences as per Count 2 (save for the superfluous words as mentioned above) be said to be innocuous or non-threatening - the imputation being that there will be impending consequences.

As per the House of Lords in **Cozens v Brutus [1973 A.C. 854]** as reproduced in **Coonjan** [supra], "... *vigorous and it may be distasteful or unmannerly speech or behavior is permitted so long as it does not go beyond one of three limits. It must not be threatening. It must not be abusive. It must not be insulting. I see no reason why any of these should be construed as having a specifically wide or a specially narrow meaning. They are all limits easily recognizable by the ordinary man ...*".

Indeed, the purport of those words, taken as a whole within *context* and Mauritian jargon, conveys with *certainty and clarity* to the listener that *that day's meeting was merely a last warning of what was to follow for those looking for trouble*.

The Court considers that the sentence/s uttered by Accused No.1/Soodhun, as per Count 2 (save for the words "... *film la pou joué plutard* ") are *per se* 'threatening' in nature.

The Court is satisfied that the Prosecution has proved Count 2 against Accused No.1/Soodhun.

Count 3 - "... taking part in an unlawful assembly and that whilst being assembled, ... conducted themselves in such manner as was likely to provoke a breach of the peace ..."

(a) Accused No.2/Somai

Accused No.2/Somai does not dispute his presence in the vicinity of the meeting but his version as per his unsworn defence statements that he was an innocent onlooker in the vicinity of the church is given the lie in view of his identification and active participation as per the DVD, photos and the testimony of DI Nutchetrum.

The Court takes note of *Photo F 16* - a photo *par excellence* which shows a clearly visible and recognisable Accused No.2/Somai on the road, holding up a sign in both hands, standing in front of a bonfire of L'Express newspapers - a far cry from being an innocent, non-participating bystander with a sign allegedly thrust in his hand by an unknown person, as per his unsworn defence statement

Photos D8, D9 and D 14, amongst others, also show Accused No.2/ Somai actively participating in the midst of the fray and in several photos he is seen in proximity with Accused No.1/Soodhun who was addressing the crowd.

(b) Accused No.3/Khemloliva

Accused No.3/Kkemloliva disputes his presence at the meeting, as per his unsworn defence statement.

His version as per his unsworn defence statements, to the effect that he was at home [at Quatre Bornes] is of no merit in view of his identification as per the DVD, photos and the testimony of DI Nutchetrum.

The Court notes the presence of Accused No.3/Khemloliva in his orange, long-sleeved tee-shirt, in most of the photos, more especially *Photos D 28 & D 29* where he is seen in the crowd (with Accused No.2/Somai nearby), carrying a poster reading “*L’Express arrête publie fausseté*”. In *Photos D 45 to D 48, D 54 to D 57*, he is seen holding up the said poster, whilst standing next to Accused No.1/Soodhun who was addressing the crowd.

Indeed, the tall, well-built Accused No.3/Khemloliva is easily identifiable. The Court has had the opportunity of seeing the latter in the dock on several occasions and there can be no doubt as regards his identification.

(b)(i) Alibi for Accused No.3 - The law and the facts

As for the alibi provided by Accused No.3 - that he was at home (and the Court also notes that he gave his mother’s name as his potential witness), the principles enunciated in *DPP v B.Camoin* [\[2011 SCJ 129\]](#) are of interest.

Indeed, the burden is on the Prosecution to negative that alibi and not on the defence to substantiate and prove the alibi, see *Alcindor v R* [\[1963 MR 47\]](#), *Ramdharry v. R* [\[1983 MR 32\]](#), and *Boodoo v. State* [\[1997 SCJ 37\]](#).

However, whether the Prosecution has been able to negative the alibi depends on the strength of the evidence adduced by the prosecution. It has also been decided by the Supreme Court that in order to negative the alibi raised by an accused party the Prosecution may rely solely on the evidence of a declarant/witness and need not call the witness named by the accused in his defence – see ***Levantard v The State* [1997 SCJ 234]**.

It is open to the trial Court to accept the version of a witness and thereby indirectly reject the version of the Accused - which in the present case is to the effect that at the material time he was at home - see ***Babeea v The State* [1997 SCJ 239]**. There is no obligation on the Prosecution to show that the Accused could not have been at the place he alleged he was and it is sufficient for the Prosecution to establish that the Accused was at the locus at the material time – see ***Mooniaruch v State* [2010 SCJ 21]**.

In the present case, this Court is entirely satisfied on its own observation and on the basis of DI Nutchetrum's testimony that Accused No.3/Khemloliva was unmistakably identified on the DVD and photos. The Court notes that no witnesses were called to substantiate his alibi.

(b)(ii) Is the charge under Count 3 proved as regards Accused Nos.2 & 3?

The Court is satisfied that **Count 3 has been proved against Accused Nos.2/Somai & No.3/Khemloliva** and this for the following reasons:-

- (a) The presence of Accused Nos.2 & 3 has been established
- (b) at the “*unlawful assembly*” of more than 12 persons;

- (c) their active participation, acts and doings as per DVD and photos, were such that it is not difficult for the Court to conclude that
- (d) they conducted themselves in such a manner as is likely to lead to or provoke a breach of the peace, whereby harm was and could have been further caused.

Indeed, actively taking part in a heated unlawful protest meeting, where there was a crowd of more than 100 persons, shattering of glass and fire used to burn copies of the vilified L'Express in front of its offices can hardly be interpreted otherwise.

Evidence from the Accused parties in support of their defence

This Court notes that all three Accused parties chose not to depose under oath in the teeth of the materially unchallenged evidence against them and which constitutes a *prima facie* case *vis a vis* their person.

The time-honoured principles of *Andoo v R* [1989 MR 241] which was cited with approval in *DPP v Bhageerutty* [2006 SCJ 158], *DPP v Bhagmaneea* [2010 SCJ 246] and *DPP v R.Khadaroo* [2011 SCJ 33] would find their application in the present case :-

*"... where the evidence for the Prosecution establishes a strong and unshaken prima facie case and the accused chooses not to swear to his statement and expose himself to cross-examination, the trial Court is perfectly entitled to conclude that the Prosecution evidence remains unrebutted. It is of course true that the burden of proving the guilt of an accused squarely lies on the Prosecution and that the accused is entitled to remain silent. His right to silence, however, is exercised at his risk and peril when, at the close for the Prosecution, a **prima facie** has been clearly established since the burden then shifts on him to satisfy the Court that it should not act on the evidence adduced by the Prosecution."*

In ***Foollee v The State*** [\[2004 SCJ 251\]](#) it was held that the Prosecution had sufficiently negated the Accused's alibi through the testimony of the declarant/witness, as follows:-

"...Whilst the burden of proof is always on the prosecution, it is clear that when evidence capable of proving the case against the accused and of disproving his defence is adduced by the prosecution, there is a kind of "tactical burden" which is borne by the accused in the sense that if he does not adduce evidence in rebuttal he may well find the case proved against him: in other words, the evidential burden shifts to the accused ...".

In the present case, it has been established through the testimonies of the prosecution witnesses, the DVD and photos, that at the material time Accused No.3/Khemloliva **was** at the meeting. However, the latter has not testified and/or called any witnesses in support of his alibi and has done nothing as regards the evidential burden that has shifted on him,

For all the reasons set out above and as the Prosecution has proved its case beyond all reasonable doubt, the Court finds -

- ❖ **Accused No.1/Soodhun guilty as charged under Counts 1 & 2 and also finds**
- ❖ **Accused No.2/Somai and Accused No.3/Khemloliva guilty as charged under Count 3.**

Dated this 19th day of January 2015.

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N.Ramsoondar,

Ag.V.President,

Intermediate Court (Crim)
(Crim)

W.V.Rangan,

Magistrate.

Intermediate Court

