

Police v Showkutally SOODHUN

2015 INT 410

IN THE INTERMEDIATE COURT OF MAURITIUS

CN 1413/12

In the matter of:

Police

V

Showkutally SOODHUN

CHARGE: Diffusing False News in breach of Section 299(a) of the Criminal Code as amended

JUDGMENT

The accused is charged for having on or about the 24th June 2011 wilfully and unlawfully diffused by means of spoken words, false news, which diffusion was of such a nature as to disturb public peace.

The spoken words as particularised in the information are as follows: *“C’est Navin Ramgoolam ki fine intervenir dans cas Medpoint. Navin Ramgoolam ine recevoir Dr. Malhotra et à la suite ca rencontre la li fine téléphone Bissessur pou faire deuxième évaluation.”*

He pleaded not guilty to the charge and was represented by Mr R Gulbul. Evidence for the prosecution was led by Mr Ah Sen together with Miss Rawoah.

It is important to consider a brief history of the political strata which existed at the time of the alleged offence; the accused was a member of the MSM (Mouvement Socialiste Mauricien) and was the then Minister of Industry and Cooperatives; Dr Navin Chandra Ramgoolam (witness 21) was the leader of the PTR (Parti Travailleiste) and was the Prime Minister; Mr Paul Raymond Berenger (witness 9) was the leader of the MMM (Mouvement Millitant Mauricien) and was the Leader of the Opposition; Dr Joomaye was a member of the MMM and was working at Fortis Darne Clinic. At the material time, the MSM and the PTR were in alliance and formed the government whilst the MMM was in the opposition. On the 26th of July 2011, the members of the

MSM resigned and the MSM was no more part of the Government but was in the opposition. The sale of the Med-point clinic, hereinafter referred to as the Med-point case, was a live issue at that time and was under wide media coverage.

The testimony of witnesses for the prosecution

Out of the 23 witnesses scheduled on the list of witnesses, the prosecution called only 4 of them.

Dr Zoubeyr Houssein Issa Joomaye, witness No 8, explained that he is in the medical practice and is also an active politician in the MMM and he stood as candidate in the year 2010. He knows the accused since about ten years and they use to have conversation each time they met. On the 24th of June 2011, he met accused at Clinic Fortis-Darne where he had a conversation with latter about health conditions, general talks and also on politically related issues; his conversation was a private one where he was exercising his freedom of speech in a private place. They talked about the Med-point case and accused suggested to him that the strategy of the MMM was wrong.

As he could not remember the words used, his memory was refreshed from a previous out of court statement given to the police and he admitted having said the following “*Berenger pe faire fausse route, Pravin Jugnauth pena narien a faire avec Med-point. Depuis 10 ans, li pas bien avec Dr Malhotra. C’est Navin Ramgoolam qui fine intervenir dans cas Medpoint, Navin Ramgoolam ine recevoir Dr Malhotra et à la suite de ca rencontre la, li fine téléphone Bissessur pour faire ene deuxième évaluation*”. Some days later, he met his political leader Mr Paul Berenger and they had some conversation during which he also related to him about his meeting with the accused. Sometime after, Mr Berenger phoned him and asked him to confirm with the accused, whether what was said is correct; same was confirmed by accused and the witness reported the confirmation to Mr Berenger. He had no reason to disbelieve what accused told him. He also agreed that Mr Berenger had two press conferences but he would not know what were said exactly in those conferences.

In cross examination, he explained that he was called by the police to give a statement as a witness but he was subject to aggressive questioning, harassment and intimidation to himself and to his family. He was called for enquiry a second time and this time as a suspect, he was again questioned aggressively and he had the feeling that the police had other motivation, so much so, that he asked to write his statement himself. He explained that it was a “*Gestapo like*”

enquiry held by the police who were receiving instructions from other quarters. He would have never disclosed his private conversations if he was not forced to do so. It was more a political enquiry led by the police under the instructions of their political masters and not an enquiring in the Med-point case and he was even cautioned for “*having agreed with Mr Soodhun and others to fabricate false facts to destabilize a government*”. He was arrested and charged provisionally but this time for the offence of “*Conspiracy to harm the Prime Minister*”. Finally, the version of the accused as to what he said to Dr Joomaye, as it appears in his out of court statement, was put to the witness and he acknowledged it to be correct.

Mr Paul Raymond Berenger testified to the effect that he held two press conferences. In the first conference he said that he had disturbing information concerning the Med-point case and in the second conference he said that he had information that the Prime Minister Mr Navin Ramgoolam had met Dr Malhotra and had phoned Mr Bissessur, Chief Government Evaluator. He explained that he did not know the reasons why Mr Ramgoolam could have met those persons. The witness got the information from Dr Joomaye and same was double checked by the latter. In cross examination, he explained that he meets members of his political party regularly and they exchange views on matters of public importance and he also holds press conferences to inform the public of matters of general public importance and at that time the Med-point case was a live issue. It was within his capacity as the leader of the MMM that he held the two press conferences among other conferences. When the police recorded his statement, they cautioned him for having disturbed the public peace. The conversation he had with Dr Joomaye was a private conversation.

Dr Navin Chandra Ramgoolam explained that Mr Berenger held a first press conference when he stated that “*a mystérieux personnage* has intervened in the Med-point case” and in a second press conference Mr Berenger alleged that it was him (Mr Ramgoolam) who intervened in the Med-point case. According to the witness, the message that Mr Berenger wanted to pass on is that Dr Ramgoolam has abused of his office by intervening with Mr Bissessur, the Chief Government Evaluator and that as Prime Minister he also met Dr Malhotra, one of the directors of Med-point clinic. Dr Ramgoolam then held a press conference on the 9th of July 2011 to clear himself as what was said by Mr Berenger was of a nature to disturb the public peace. Afterwards, he reported a case to the police. He also stated that the false news were widely spread and that according to a survey, people at large believed that he interfered in the valuation of Med-point clinic.

In cross examination he said that it was Mr Berenger who was the only one who diffused the false information when giving his two press conferences. The witness went on saying that there was no disturbance in the country as he denied the imputations of Mr Berenger.

CI Raghoonundhun produced two statements he recorded from the accused, Documents A and A1 refer. He explained that Dr Ramgoolam, the former Prime Minister reported a case of diffusing false information against Mr Berenger who was the leader of the opposition. At no time was accused in the present case charged for diffusing false information as accused did not diffuse any information. The witness could not say anything on the imputations casted by Dr Joomaye on the way his interview was carried out by the police; he said he does not recollect anything; or just replied he could not say; or he cannot reply. He could only say that at the end of the enquiry with Dr Joomaye, the latter was arrested and brought to Court for a provisional charge.

The version of accused.

The version of accused can be seen from his out of court statements and is as follows-

He agreed that on 24.06.2011, he met Dr Joomaye at Darne Clinic and they had a private conversation and talked about politics among other conversations. He denied the version of Dr Joomaye, as given to the police but agreed having spoken to the latter and that they talked on the Med-point case also. In a gist his version is that he reproached Dr Joomye that his leader was wrong and that Pravind Jugnauth had nothing to do in the Med-point case; he was not in good terms with Mr Malhotra, his brother in law since 10 years; that Dr Navin Ramgoolam knew the case thoroughly and he had the impression that it was the latter who intervened in the case. Dr Joomaye also asked him if the then Prime Minister met Dr Malhotra and Mr Bissessur to which he replied that a Prime Minister could meet whoever he wanted. He never told Dr Joomye that the Prime Minister met Dr Malhotra and thereafter phoned Mr Bissessur and it could well be that such a version was the interpretation of Dr Joomaye about what they talked. At no time did he told Dr Joomaye to go and relate to Mr Berenger what they talked about; it was a private conversation. He also agreed that on 01.07.2011, Dr Joomaye came to see him in his office; without repeating what he initially said on 24.06.2011 he confirmed what he said but not what Dr Joomaye could have interpreted. The witness also explained why he had the impression that Dr Ramgoolam could have intervened into the Med-point case. Finally he said that he had no

control on what Dr Joomaye could have told Mr Berenger and also on what Mr Berenger could have told to the press.

An analysis of the facts

It is not disputed that on the 24th June 2011, Dr Joomaye met the accused in the corridor of the Clinic where they talked on the Med-point case and that sometime later the parties met anew in the office of the accused and had a brief talk on the same Med-point case. Two press conferences were held on the 2nd July 2011 and 9th July 2011 by Mr Berenger who spoke about a “*mystérieux personnage*” on the first time and on the subsequent occasion he revealed that Dr Ramgoolam met Dr Malhotra and phoned Mr Bissessur. The news was widely diffused by the press. Dr Ramgoolam made a press conference to deny his involvement in the Med-point case and on the 14th July, he made a declaration of diffusing false news which led to the present case. The disputed fact concerns the words which were allegedly uttered by the accused to Dr Joomaye and which have been averred in the information.

The case of the prosecution rests mainly on the evidence of Dr Joomaye who has clearly said that his conversation with the accused was a private one. It is important to highlight what has been said under solemn affirmation about the way the investigation was carried out and the manner in which the statements of the witness was recorded. The witness has, in no uncertain terms, said that his statements were extracted from him and he did not want to relate his private conversation. It should also be stated that CI Raghoonundhun was cross-examined on the investigation procedures and the blame casted by Dr Joomaye, he could not enlighten the court and he did not even rebut the version of Dr Joomaye. The weight to be attached to the content of the statements is therefore in issue. The prosecution has relied on those statements to refresh the memory of Dr Joomaye and the more so on material issues with regard to what accused told him and which form the basis of the charge of the information. This is most inappropriate and the evidence which was ushered out of the refreshing memory of a witness from a tainted statement is not up to the standard of proof required in criminal cases.

Be that as it may, what was said in chief by the witness as particularised in the information is materially different from what the witness later agreed during cross-examination. He confirmed that the version of accused to the following was correct: “...*Mo ti aussi ena l'impression qui le*

premier ministre fine intervenir dans le cas de Medpoint. Après sa nous fine cause les zotte zaffaires...”

These two versions on what was allegedly said by accused bring inconsistency in the case for the prosecution.

Also, for the second meeting which Dr Joomaye had with accused, there is some material variance as the witness agrees with the version of accused which reads as follows - “...*Dr Joomaye fine demande moi si Premier Ministre fine zoine Malhotra et Bissessur, mo fine dire li qui li ene Premier Ministre, li capave zoine ceki li joine et coze avec n’importe kisanla li envie*”. This is material departure from what he initially said in examination in chief.

Dr Joomaye has said that he had a private conversation with the accused and he related that to Mr Berenger. Subsequently Mr Berenger had two press conferences but the witness was not present and he would not know what has been said in the press conferences. Therefore the link between what he received as information and what was said in the conferences is missing. It would have been important in criminal cases for the prosecution to establish by the witness himself, the link between what information he received and what was allegedly diffused by another person.

Mr Berenger who was the mouth piece in the two conferences has stated that in his first conference he said that he had disturbing information concerning the Med-point case and in the second conference he stated that he had information that the Prime Minister Mr Navin Ramgoolam had met Dr Malhotra and had phoned Mr Bissessur, but he did not know the reasons why Mr Ramgoolam could have met those persons. Therefore the words used by the witness is materially different from the averments of the information.

Dr Navin Chandra Ramgoolam explained that Mr Berenger held a press conference on the 2nd of July 2011 when he stated that “*a mystérieux personnage*” has intervened in the Med-point affair and in a second press conference Mr Berenger alleged that it was him (Mr Ramgoolam) who *intervened* in the Med-point affair. The version of Dr Ramgoolam and that of Mr Berenger are materially in contradiction and the more so it is again at variance with the averments of the information.

Under the exception to the hearsay rule, an admission of fact in an out of court statement is admissible in evidence. The accused has admitted having met Dr Joomaye on the two occasions and having talked about the Med-point case. However, what he said to Dr Joomaye

and what has been reported are materially different and it can safely be said that accused has denied the charge.

All these show that the exact nature of the words which were actually uttered by the accused are blurred; what has been averred in the information and what has been adduced in evidence are somewhat at variance. It seems to us that what has been said by the accused; what has been interpreted by Dr Joomaye and said to Mr Berenger; what has been interpreted by Mr Berenger and said in the press conferences; what has been interpreted by Mr Ramgoolam and reported to the police and finally what has been averred in the information are all different in some material ways.

There is also the unchallenged evidence of two prosecution witnesses, the complainant and CI Ragoonundhun, who said that Mr Berenger was the only one who diffused the false information.

An analysis of the provision of the law

Learned counsel on both sides made pertinent submissions, referring to the French Law and Dalloz, which will now be considered.

Section 299(a) of the Criminal Code reads:

“The publication, diffusion or reproduction, by any means, of false news or of news which though true in substance has been altered in one or more parts or falsely attributed to some other person, if the publication, diffusion or reproduction is of such a nature as to disturb public order or public peace, shall be punished –

(a) where the offence is committed by means of any spoken words by a fine not exceeding 100,000 rupees and imprisonment for a term not exceeding 2 years;

(b)...

unless it is proved by the accused that the publication, the diffusion or reproduction was made in good faith and after making sufficient inquiries to ascertain its truth.”

Our law emanates from the French Law, article 27 de la Loi du 29 Juillet 1881. The elements of the offence are:

1. L'existence d'un fait de diffusion (The diffusion)
2. La fausseté d'une nouvelle (false news)
3. Trouble à la paix publique (of a nature to disturb public peace)

4. L'intention coupable et en outre la mauvaise foi (the intention and bad faith)

However, in our law, the accused is provided with a defence which is to establish that the diffusion was made in good faith and after the truth was ascertained. The evidential burden then shifts upon him.

L'existence d'un fait de diffusion

The charge preferred is that of diffusion as compared to publication or reproduction.

Mr Ah Sen submitted that it is not necessary that the diffusion be made in a public place, but there should be the intention of having the false news being "*répandues dans le public*". He referred to **Dalloz, Répertoire pénal, Fausses Nouvelles, para. 9-11**:

« ...l'article 27 n'exige qu'une publication, diffusion ou reproduction, par quelque moyen que ce soit. Cela englobe les écrits, les paroles et, plus généralement, les moyens de publicité prévus par l'article 23 de la loi, mais aussi tout autre moyen de diffusion.

L'article 27 de la loi de 1881 n'exige pas que le lieu où les propos constitutifs d'une nouvelle fausse ont été tenus soit public. Il a en effet, été jugé que la loi ne fait résulter le délit « que de la volonté de publier et de la publication, c'est-à-dire de cette circonstance que les fausses nouvelles ont été répandues dans la public, et non de la nature de lieu où elles ont commencé à se produire. »

He further stated that by giving the news verbally to Dr Joomaye which has subsequently been conveyed to the press by Mr Berenger, amounts to diffusion.

Mr Gulbul referred to **Encyclopédie Dalloz, Droit Criminel, Fausses Nouvelles, note15** on diffusion :

« ...Quant à la “diffusion” il s’agit d’un terme nouveau introduit par l’ordonnance du 6 Mai 1944. D’après l’exposé des motifs, l’expression « diffusion » doit permettre d’atteindre les agences d’information. »

He further referred to the case of **G Seneque and Anor v The Director of Public Prosecutions 2002 UKPC 42** at para 19: “...Section 299, however, does not make it a criminal offence simply to publish criticism of Government or Government policy even when the facts stated are false. It must be established that the false statements are of such a nature as to disturb public order or public peace.”

It is not disputed that the news to the effect that Dr Ramgoolam met Dr Malhotra and phoned Bissessur, were ultimately revealed by Mr Berenger during his press conference.

We find it relevant to refer to **Encyclopédie Dalloz, Droit Criminel, Fausses Nouvelles, note 17:**

« ...Il n’est donc pas nécessaire, quand le délit a été commis par la parole, que les discours aient été proférés dans des lieux ou réunions publics ; il suffit que la fausse nouvelle ait été répandue dans le public. Il faut par conséquent établir qu’une publication a été effectuée réellement et, d’autre part, que l’auteur de la fausse nouvelle avait l’intention qu’elle soit publiée. L’intention résultera d’un ensemble de circonstances révélant des faits personnels à l’auteur, par exemple des circonstances de lieu ou le propos a été tenu, du nombre de personnes à qui il s’est adressé, de la qualité de ces personnes... »

It is therefore clear that the words spoken were “répandues dans le public”, which takes us to the issue of whether the news diffused was false.

La fausseté d’une nouvelle

Jurisclasseur Vo Fausse Nouvelles para 12 gives the definition :

« La diffusion incriminée doit être une « nouvelle », c’est-à-dire, d’abord, un fait et non un commentaire ou une opinion. La notion de nouvelle implique, en effet, la diffusion « d’un fait précis et circonstancié. »

In **Dalloz, Répertoire pénal, Fausses Nouvelles, para. 16**, we read :

« Le délit de l'article 27 de la loi de 1881 suppose que la nouvelle soit fausse, "c'est-à-dire mensongère, erronée ou inexacte dans la matérialité du fait et dans ses circonstances." »

Mr Ah Sen submitted with regard to "nouvelle" that the testimony of Dr Joomaye shows that the conversation about politics was in fact about the Med-point case which is « *un fait précis et circonstancie* ». On the issue of "fausseté", he stated that Dr Ramgoolam clearly deposed to the effect that the news given was false and was intended to portray him as a corrupt and unscrupulous Prime Minister who had made an abuse of his authority.

We agree that there was diffusion of something "*précis et circonstancie*". However, there should also be "*un fait*" as opposed to a comment or an opinion.

Now the accused's version is that it was an opinion and he explained the circumstances which led him to form that opinion in his second statement.

Dr Joomaye firstly could not recall the exact conversation he had with the accused and his memory had to be refreshed. As stated above, the weight to be attached to the content of such a statement is questionable and the memory of the witness has been refreshed from a tainted statement. Then, he agreed that in his statement he mentioned that the accused told *him more or less* the words as particularised in the information and finally confirmed that the accused told him that he had *the impression* that Dr Ramgoolam intervened in the Med-point issue.

Therefore part of the element, "*un fait*" has not been proved beyond any doubt.

Further, there is no evidence that the news were false. Dr Ramgoolam gave his version of facts. But there is nothing on record to suggest that Dr Ramgoolam did not intervene and that there was no second evaluation of the clinic. We have not been placed into the full picture of the Medpoint issue.

Trouble à la paix publique

In **Hurnam v Khodabux 1989 MR 236**, the Court referred to **Encyclopédie Dalloz** with regard to the interpretation given to disturbance of the public peace:

« According to *Encyclopédie Dalloz, Droit Pénal, Vol II, Vo Fausses Nouvelles*, the notion of "*trouble à la paix publique est relative au péril et au danger qui affectent la*

sécurité des personnes et des biens et qui sont de nature à susciter des désordres matériels ou une émotion collective assez profonde pour impressionner l'esprit public et entraîner la panique. Peu importe son aire géographique: le trouble peut être limité à un canton, ou à un village...".

Again, note 34 makes the point that where there is likelihood of disturbance of the public peace or "virtualité de trouble, celle-ci résultera de l'objet de la nouvelle et notamment de sa gravité, rapprochés des circonstances de temps, de lieu, d'ambiance et de milieu qui rendent le trouble plausible".

Furthermore, **Encyclopédie Dalloz, Procédure Pénal, Vol III, Fausses Nouvelles, note 30** and **32** read as follows:

" La fausse nouvelle n'est punissable que si elle a troublé la paix publique ou si elle contient par son objet un ferment de troubles publics, c'est-à-dire non seulement de désordre, d'émeute ou de panique, mais, d'après l'interprétation jurisprudentielle, d'émotion collective et de désarroi. La notion de trouble se réfère à la notion de sécurité et de tranquillité publique. Le fait que la fausse nouvelle était de nature à troubler la paix publique est un élément constitutif du délit".

"La notion du trouble à la paix publique est relative au péril et au danger qui affectent la sécurité des personnes et des biens et qui sont de nature à susciter des désordres matériels ou une notion collective assez profonde pour impressionner l'esprit public et entraîner la panique. "

The disturbance of public peace therefore requires that there was "*désordre, panique, émotion collective, désarroi et émeute*" which are strong words. It is agreed in the present case that there has not been any actual disturbance. What the prosecution, however, has to prove is the potentiality of the disturbance.

Mr Ah Sen submitted that bearing in mind the circumstances in which the false news was given, its gravity as well as the status of the parties involved, it would have created a disturbance. He highlighted that the news came from a sitting Minister of the government of the day headed by Dr Ramgoolam. The news portrayed Dr Ramgoolam as a corrupt and unscrupulous person since he had abused his authority to intervene in the Med-point issue by asking for a second evaluation.

Mr Gulbul contented that the prosecution has not proved this element. There was not sufficient evidence of the risk of potential disturbance. By holding an immediate press conference to nullify and dissipate whatever fictitious disorder he had in mind, Dr Ramgoolam properly addressed any trouble which could have emanated from the news.

Mr Berenger whilst deposing opined that the news would have caused a “*bouleversement*”. History reveals that sometime after, the Alliance PTR/MSM did not subsist and all members of the MSM resigned from the government because one of its members was arrested. Thereafter, the PTR continued to be in the government for the remaining of the five years.

We nevertheless do not find that the news was such of a nature to disturb the public peace. True it is that there was a blame on Dr Ramgoolam and the news, if correct, constitutes a criticism of the leader of the PTR. We do not find that the news fall in the category of causing “*peril, danger qui affectent la sécurité des personnes et des biens...*” All we had was Dr Ramgoolam’s private rights in what he described as the polls outcome carried out by L’Express, with the 74% of 600 people surveyed thinking that he was involved in the Med-point scandal. We are however here not dealing with the protection of private rights.

We furthermore note that despite that Dr Ramgoolam made his press conference to dissipate the impact of the news given by Mr Berenger, the majority of the people surveyed still believed that he was involved in the Med-point case, but yet there was no disorder.

Of relevance is **note 31 of Encyclopédie Dalloz, Procédure Penal, Vol III, Fausses Nouvelles:**

“ Le délit de fausse nouvelle ne protège pas les droits et intérêts privés. La notion de trouble à la paix publique permet de distinguer le délit du simple dommage fondé sur les articles 1382, 1383 du Code Civil lorsque la nouvelle fausse, la pièce fabriquée ou falsifiée cause un préjudice à un particulier et ne revêt pas en même temps un caractère général pour faire impression sur l’esprit public. »

We need equally refer to the case of **G Seneque and Anor v The Director of Public Prosecutions 2002 UKPC 42**, where the Judicial Committee of the Privy Council held at paragraph 20:

“Their Lordships accept that public indignation or outrage at some act of the Government or Government policy may be such that a false statement about such act or

policy could be capable of creating a likelihood of disturbance occurring i.e. could be of such a nature as to disturb public order or public peace. The mere fact that such a statement is critical of Government and even that people, and particularly voters, will not like it, however, is not in itself enough.”

Intention coupable

Mr Ah Sen submitted that it can be inferred from the circumstances that the accused had the intention of the false news being diffused.

He referred to the fact that Dr Joomaye was a member of the MMM and the Med-point case was in the limelight. Being a Minister, the accused diffused false news against his own Prime Minister (the Alliance PTR/MSM was the government of the day). He could have anticipated that Dr Joomaye would have reported the matter to his leader. Moreover, he referred to the second meeting which Dr Joomaye had with the accused wherein the latter asked whether the message was conveyed to the leader of the opposition.

All the conversations which preceded the press conferences were private in nature and this has been stressed by all the parties; the conversation between Dr Joomaye and the accused was strictly a private one which took place unexpectedly on private premise as well as the conversation between Mr Joomaye and Mr Berenger. Mr Gulbul submitted that a private conversation between two persons without any evidence that such conversation was meant to be diffused to the public is not sufficient to establish that there was diffusion by the accused.

In **Encyclopédie Dalloz, Droit Criminel, Fausses Nouvelles, note 18**, we read :

« ...il faut que celui qui l'a émise ait eu le dessein de la rendre publique, et que le résultat, c'est-à-dire la publicité, ait répondu à son intention. Ainsi, l'individu prévenu d'avoir inventé dans une conversation particulière une nouvelle fausse qui, depuis, a circulé dans le public, est avec raison renvoyé des fins de la poursuite lorsqu'il n'est pas établi que cette publication avait été voulu par lui. »

We find from note 17 and 18 above that the prosecution has to prove that the accused knew that the news was meant to be “*répandue dans le public*”. For that purpose, we need to take into account all the circumstances relating to the personal factors of the accused more particularly, the place where the words were spoken, the number of persons to which he spoke and in what capacity they were said.

We have taken into account the different political implications and that there was a “cassure” in the alliance PTR/MSM following the Med-point case. For reasons to follow we do not find that the accused meant that the news be made public. We bear in mind that the accused and Dr Joomaye met unexpectedly in the corridor of a Clinic and the conversation took place there and then. They had a “*general talk, without any other motivation that what two Mauricians would talk*” as stated by Dr Joomaye.

It is obvious that the accused spoke only to Dr Joomaye. No other person was present. It is agreed that the accused did not speak to Mr Berenger and that the latter was informed about the news only from a conversation with Dr Joomaye when they met and Mr Berenger also stated that it was a private conversation which he had with Dr Joomaye. As the leader of opposition, he thought it right to inform the public about it.

With regard to their capacity, it is the submission of Mr Ah Sen that in view of their political affiliation, each of them being in separate party, the accused should have known that Dr Joomaye will relate the matter to his leader. The record shows that Dr Joomaye and the accused are acquainted to each other for over 10 years, despite being political adversaries. Dr Joomaye was at a certain time his treating doctor. The conversation took place in a typical manner, being qualified as a general talk.

It is a fact that Dr Joomaye met the accused a second time, during which the latter confirmed that whatever he stated during the first conversation was correct. It is clear that it was not the accused who asked for a meeting and instead Dr Joomaye came to see him. The accused explained that he asked Dr Joomaye whether he spoke to Mr Berenger, for the purpose of changing their strategy and not to make the news public for “*li ti pe faire fausse route*”.

There is however no evidence on record that Mr Berenger publicized the news at the instigation of the accused.

Note 24 of Encyclopédie Dalloz, Procédure Pénal, Fausses Nouvelles is relevant :

« ...*En présence d’une infraction telle celle de l’article 27, qui peut ouvrir le champ à l’arbitraire, la jurisprudence de la Cour de Cassation, par de sages ménagements, a été amenée à exiger une publicité effective et la preuve de l’intention de propager qui ne peut se déduire du simple usage de la conversation (V. Crim. 25 Juin 1858, rapporte par BARBIER-MATTER, op.cit., no 352). Ainsi l’individu prévenu d’avoir inventé dans une conversation particulière une nouvelle fausse qui, depuis, a circulé dans le public, est*

avec raison renvoyé des fins de la poursuite lorsqu'il n'est pas établi que cette publication avait été voulue par lui (Crim. 25 Juin 1858, préc; Poitiers, 5 févr. 1875 D.P. 76.1.401). »

Mauvaise foi

Reference has to be made to **Encyclopédie Dalloz, Droit Criminel, Fausses Nouvelles, note 20:**

“La mauvaise foi se déduit de la connaissance de la fausseté de la nouvelle et de la volonté de l'accréditer et de la répandre. L'intention de nuire synonyme de mauvaise foi ne se rattache directement qu'au fait de la publication, de la diffusion ou de la reproduction, et qu'à la connaissance de la fausseté du fait ou de la pièce au moment même de la publication... »

Our section 299 lays a burden on the accused to prove that he was in good faith. But this is after the prosecution has proved all the other elements of the offence and which for reasons given above, we conclude have not been proved. The prosecution has not been able to establish beyond reasonable doubt that the news was false. There is therefore no burden on the accused to prove that the news was given in good faith.

Now, it is the suggestion of prosecution's counsel that since the accused did not depose and his unsworn statements do not make mention of the fact that he made inquiries to ascertain the truth of the news, he had failed to discharge this burden.

We do not agree. We refer to what we said earlier with regard to the version of the accused in respect of the impression he had. In his second statement to the police, he explained why he had that impression and this has been confirmed by Dr Joomaye. This issue has therefore not been proved conclusively and there is a doubt in our mind as to the exact words uttered. Dr Joomaye went further and even agreed with what the accused told him during the first meeting, when it was put to him during cross-examination.

He equally agreed to what the accused had said during the second meeting: *“...Dr Joomaye fine demande moi si Premier Ministre fine zoine Malhotra et Bissessur, mo fine dire li qui li ene Premier Ministre, li capave zoine ceki li joine et coze avec n'importe kisanla li envie »*

We have already addressed this issue above and the inconsistencies resulting. We therefore conclude that the accused had no burden to prove anything.

For the above reasons, we hold that the prosecution has not proved its case beyond reasonable doubt and we dismiss the case against the accused.

V.Appadoo
Magistrate

B.R.Jannoo- Jaunbocus
Magistrate

Intermediate Court (Criminal Division)
This 6th November 2015.