

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 153 of 2006

BETWEEN

ISRAEL B. KHAN

APPELLANT

AND

SHERMAN MC NICHOLLS

RESPONDENT

PANEL: A. MENDONCA, J.A.

P. JAMADAR, J.A.

R. NARINE, J.A.

APPEARANCES:

Mr. K. Scotland and Mr. D. Khan for the Appellant.

Mr. N. Byan and Ms. Khan for the Respondent.

JUDGMENT OF JAMADAR, J.A.

DATE OF DELIVERY: 12th January, 2012.

“We pretended to be real, to be learning, to be preparing ourselves for life, we mimic men of the New World, one unknown corner of it ...”

V.S Naipaul: The Mimic Men, 1967

“The first ambition of the colonized is to become equal to that splendid (European) and to resemble him to the point of disappearing in him.”

Albert Memmi: The Colonizer and the Colonized, 1957

JUDGMENT

Introduction

1. On the 21st January, 2005 Israel B. Khan, Senior Counsel,¹ and head of Justitia Omnibus Chambers in Port of Spain, entered the Coroner’s Court in the Magisterial District of St. George West dressed in a Nehru suit. The Coroner was the then Chief Magistrate, Mr. Sherman Mc Nicholls, and the inquest concerned the death of one Galene Bonadie.

2. Mr. Khan had been retained to watch and protect the interests of four police constables whose conduct was under investigation in relation to the said death. The matter was on-going and Mr. Khan had appeared on several occasions prior to the 21st² dressed in a jacket and tie and had enjoyed the usual right of audience afforded to attorneys-at-law representing clients or looking after their interests in the Magistrate’s Court.

3. On the 21st Mr. Khan attended the court hearing dressed in his Nehru suit. It was a formal cut Nehru suit (with a closed and buttoned band collar),³ with padded shoulders, fully lined with an internal breast plate and matching tailored trousers. In colour, it was ash to dark grey with a hint of moss green. Indeed, the uncontroverted opinion evidence of Mr. Ragoonath Chaboo, the master tailor (of some forty-six years experience) who made the suit, was that “the Nehru jacket though of a different style is equivalent in terms of formality and elegance to the western style business jacket.” Mr. Khan was wearing not just a Nehru jacket, but a complete Nehru suit.

¹ Mr. Khan was admitted to the Bar on the 19th October, 1979 and awarded Silk on the 5th December, 2000.

² In fact he had previously appeared on the 3rd, 4th, 5th, 6th, 10th, 11th, 12th, 17th and 19th of January, 2005.

³ The collar of the Nehru jacket blends the collar of the *achkan* (the royal court dress of some Indian nobles) – “*Band Gale Ka Coat*” (“Closed Neck Coat”), with the Western style suit jacket,

4. To Mr. Khan's surprise and 'severe embarrassment'⁴ he was denied the right of audience in the Court because he was dressed in his Nehru suit. The Coroner explained his position and what had transpired in Court as follows:

4. On the 21st January, 2005, I was sitting as the Coroner in the inquest into the killing of Galene Bonadine. On entering the court on the said date my attention was drawn [to] the Applicant and his attire. Consequently I informed the Applicant that he would not have a right of audience dressed as he was in a Nehru Suit. I further informed the Applicant that he had to change the Nehru Suit to the traditional Jacket and tie. The Applicant then left the Court. Sometime later the Applicant returned dressed in a jacket and tie and was allowed to address the Court.⁵

5. In fact there is general agreement on the essential facts surrounding this incident. Following the hearing on the 21st, Mr. Khan, on the 27th January, 2005, wrote to the Chief Magistrate and Coroner requesting him to reconsider and rescind his decision that he must wear a jacket and tie in order to enjoy any right of audience before the Chief Magistrate, and in particular imploring him to recognize the Nehru suit as appropriate wear for the Magistrate's Court.

6. The relevant portions of Mr. Khan's letter of the 27th January, 2005 were as follows:

Re: Your ban on the wearing an outfit (Nehru-collar suit) without a tie in your Court

You will recall that on Friday 21st January 2005 I was in attendance at the Eighth Magistrate Court for the Inquest touching the death of Galene Bonadie when you made a verbal ruling that I must wear a tie in order to have the right of audience in your Court.

I attempted to persuade you that I was properly dressed and if you insist that I cannot wear a Nehru-collar suit in your Court you will be depriving me of my cultural heritage. I pointed out that there is no practice direction stating that I must wear a tie at the Magistrate's Court. You sought the assistance from Mr. Desmond Allum S.C., President of the Criminal Bar Association (who was present in your Court) and he indicated to you that Chief Justice Bernard had given a Practice

⁴ Paragraph 8 of Mr. Khan's affidavit.

⁵ Paragraph 4 of the Chief Magistrate's affidavit.

Direction vis a vis Code of Dress and you are entitled to regulate attorneys' mode of dress in your Court. In addition to that, the Express Newspaper carried a comment from the Chief Justice Sharma which supported your ban on the Nehru-collar suit.

I wish to bring to your attention the Practice Direction of Chief Justice Bernard; it is dated 8th December 1986. Please find a copy of same attached to this missive.

It should be noted that the Practice Direction is for the High Court and not the Magistrate's Court: it should be especially noted that for the Chamber and Master's Court all that the Practice Direction states is that "the practitioner should be in sober attire such as for example black, grey, blue, white, brown". Nowhere is it stated that a practitioner must wear a tie.

Be that as it may, it is submitted that Rule 40 Part A of the Code of Ethics of the Legal Profession Act is more on point for the mode of dress as it relates to attorneys-at-law attending the Magistrate's Court. Rule 40 aforementioned comes under the rubric: "In Relation to the Courts and the Administration of Justice". It states: "An attorney-at-law appearing before the Court shall at all times be attired in such a manner as prescribed or agreed by the proper authorities and **as befits the dignity of the Court**".

Sir, my research indicates that there is no code of dress prescribed or agreed upon for attorneys appearing in the Magistrate's Court. **Thus applying rule 40 of the lawyer's Code of Ethics mutatis mutandis, the mode of dress for the Magistrate's Court is that attorneys must be attired in such a manner as "befits the dignity of the Court".** It is not necessary to wear a tie in order for attire to befit the dignity of the Court.

I am sure that Your Honour will readily agree with me that the Nehru-collar suit is an elegant, sophisticated and dignified attire.

As a point of interest it is instructive to inform you that the Nehru suit was one element of Indian dress that penetrated western dress. This style of suit was single breasted and slightly fitted with a band collar. It was based on a traditional Indian jacket and named after Prime Minister Jawaharlal Nehru because he commonly wore this cultural Indian garment. **This suit was worn as an alternative to the European suit.**

Your Honour, in giving your ruling (ban on the Nehru suit) you made it quite clear that you do not wish to set a precedent by allowing me the right to audience in an attire other than the traditional European jacket and tie.

The traditional European jacket and tie is the formal apparel of our former slave masters and colonizers. The Nehru suit is really an adaptation of massa's formal wear: it is a compromise between an Indian and European formal wear.

I wish to have the option of exercising the right to wear something that reminds me from whence I came so that I can know where I am going. Sir, leave me with a little remnant of my heritage.

I therefore implore you to rescind the order that I must wear a tie in order to have the right of audience in your Court: And if you are not minded to accede to my request, you will leave me with no alternative but to file a Constitutional Motion in the High Court for a declaration that the Nehru suit befits the dignity of the Magistrate's Court and it is not compulsory for an attorney to wear a tie in order to have right of audience.

7. Clearly Mr. Khan felt strongly about the issue. And did so based both on law and also on a critical interpretation of cultural imperialism, associated with the historical experience of colonialism generally and British colonialism in particular and its negative effects on the cultural identity of colonized peoples.⁶

8. The Chief Magistrate responded on the 2nd February, 2005 in writing, as follows:

My direction to you on Friday 21st January, 2005 on the question of dress was in keeping with the well-established practice in the Magistrates' Court, that is, traditional jacket and tie for men.

In light of Rule 40 Part A of the Code of Ethics of the Legal Profession Act No. 21 of 1986 which you referred to in your letter, may I respectfully suggest that you seek an audience with the Law Association with a view to approaching the Honourable Chief Justice for a resolution of this matter.

⁶ His correspondence, affidavits and submissions are replete with such references, in support of his arguments for freedom of cultural expression and against 'the closed mindset' he ascribed to the Chief Magistrate. For example, his citations included the recent West Indian publication 'The Thought of New World; The Quest for Decolonisation'. (Ian Randle Publications, 2010). Clearly Mr. Khan was advocating the need for Caribbean people to 'emancipate themselves', popularized by Robert (Bob) Nesta Marley in his Redemption Song: "Emancipate yourselves from mental slavery, none but ourselves can free our minds" (and note that as far back as 1937, in a speech in Menelik Hall, Nova Scotia, Canada, Marcus Mosiah Garvey had said in relation to his call for colonized peoples to establish a new sense of self: "We are going to emancipate ourselves from mental slavery because whilst others might free the body (in reference to chattel slavery), none but ourselves can free the mind"). This call to and longing for true freedom has been in the hearts and minds and souls of colonized peoples for generations, and Mr. Khan's actions are but one more example of this existential thrust.

9. Mr. Khan subsequently, and following the suggestion of the Chief Magistrate, did seek to have the Law Association resolve the matter. But in a rather curious response the President of the Law Association replied in writing as follows:

Your letters dated 28th January, 2005 and 11 February, 2005 refer. The Council of the Law Association has considered the matters raised therein. The Council is of the view that at this time there is no need for the intervention of the Council in the matter raised by you.

10. Left with no change of mind by the Chief Magistrate and no intervention by the Law Association, Mr. Khan decided to pursue his cause by way of judicial review.

11. His first attempt failed. On the 16th May, 2005 Bereaux J. refused leave to pursue judicial review of the decision of the Chief Magistrate, being of the view that “the Applicant’s case does not raise any public law issue but rather ... a social issue that should be addressed by the Law Association”.⁷ However, Mr. Khan was undeterred and by an application made directly to the Court of Appeal (dated the said 16th May, 2005) he sought the requisite leave. On the 25th May, 2005 the Court of Appeal (Warner, J.A., Archie, J.A. and Mendonca, J.A.) granted him leave to seek the following relief:

- (a) A declaration that the decision or order dated or made the 21st day of January 2005 of His Worship Magistrate Sherman Mc Nicolls, Chief Magistrate of the Republic of Trinidad and Tobago, and Coroner in the matter of the Inquest touching the death of Galene Bonadie to order the applicant to change his Nehru suit and adorn a traditional jacket and tie in order to enjoy the right to an audience and or to represent his client in his Court is unreasonable, illegal, null and void and of no effect.
- (b) A declaration that to hold that the Nehru suit does not befit the dignity or the Court is unreasonable and or an abuse of his discretion.
- (c) An order of certiorari to bring into the High Court of Justice and quash the decision or order dated or made the 21st day of January 2005 of His Worship Sherman Mc

⁷ See paragraph 6 of the affidavit of Dawn Mohan, attorney-at-law.

Nicholls... whereby the said Coroner ordered Israel B. Khan to wear a traditional jacket and tie in order to enjoy the right of audience and or to represent his client in his court.

(d) Damages.

(e) Costs.

(f) That all other necessary and consequential directions be given.

12. Following this Mr. Khan's matter was heard and determined by Stollmeyer J. who, in a written judgment dated the 1st November, 2006, dismissed his application for judicial review and made no order as to costs. Dissatisfied with the decision of Stollmeyer J., Mr. Khan on the 12th December, 2006 appealed the trial judge's decision.

13. As can be seen from the relief sought, Mr. Khan sought to challenge the Chief Magistrate's decision on the bases that it was unreasonable, illegal, an abuse of discretion and consequently null and void. Before the trial judge Mr. Khan raised, in addition to the grounds of unreasonableness and abuse of discretion, issues of deprivation of legitimate expectation, contravention of his fundamental right to freedom of expression and discrimination on the ground of gender. None of these arguments found favour with the trial judge

Disposition

14. In my opinion and as stated by the President of the Court (Mendonca, J.A.) on the 4th November, 2011, when he gave the unanimous oral decision of this Court, the decision of the Chief Magistrate on the 21st January, 2005 to refuse Mr. Khan the right of audience because he was dressed in the Nehru suit which he was wearing on that day, in the colour and tailored as it was, and not to grant him such a right of audience unless and until he appeared attired in a jacket and tie, was both unreasonable and irrational and should be quashed.

Analysis

15. The first point which needs to be stated is that this decision of the Chief Magistrate was properly reviewable. It involved an obvious public element – a decision affecting the right of audience of an attorney-at-law before a public court. It also concerned the right of a person, who

has a matter or whose interests can be affected in proceedings before the court, to be represented by counsel of his/her choice (which in the context of the rule of law, raises issues of fundamental fairness and concerning the *audi alteram partem* principle) . And in both circumstances, whether and if so when the rights in question can be suspended or lost by reason of the attire worn by an attorney-at-law. This case therefore raised serious questions of importance in relation to personal rights and the general administration of justice in Trinidad and Tobago. In any event, it has never been disputed before this Court that the Chief Magistrate's decision is amenable to judicial review – being the decision of an inferior court or tribunal and of a person performing a public duty and function (pursuant to statute).

16. In my opinion this application for judicial review is legitimate both because Mr. Khan was a person whose interests were adversely affected by the decision of the Chief Magistrate and because the application is justifiable in the public interest (what is permissible wear by male attorneys- ay- law to entitle them to a right of audience in the Magistrate's Court generally and the Coroners Court in particular). As will be seen, this matter also raises issues of legal professional ethics.

The Chief Magistrate's Explanations

17. The Chief Magistrate explained the reasons for his decision of the 21st January, 2005 and his insistence on it thereafter twice. First in his written response to Mr. Khan dated the 2nd February, 2005 (quoted above), and second in his affidavit filed in these proceedings on the 2nd November, 2005, as follows:

5. It is an unwritten convention in the Magistrate's court that male Attorneys suit themselves in jacket and tie. Consequently, I was of the view that the Applicant by the wearing of a Nehru suit was lowering the standard of the Court because he was deviating from the standard practice in the Magistrate's Court. At that time, it was of paramount importance to me that the standard of the court was not lowered.

6. Further I was of the view that while the Nehru Suit may be appropriately worn in certain circumstances, it certainly did not lend itself to befitting the dignity of the

court. While the Legal Profession Act does not specifically mention the mode of dress of an Attorney-at-Law appearing in the Magistrate's Court, Rule 40 of the Code of Ethics of the Legal Profession Act stipulates that "an Attorney-at-Law appearing before the court shall at all times be attired in such a manner as prescribed or agreed by the proper authorities and as befits the dignity of the Court".

7. I know that there are two female attorneys who wear saris to the Magistrate's Court. When I became a magistrate in 1988 I met this tradition in the Magistrate's Court.

18. It is noteworthy that in the Chief Magistrate's contemporaneous written explanation (of the 2nd February, 2005), which followed Mr. Khan's written request for him to reconsider his decision, the Chief Magistrate gave a single reason: "My direction to you ... was in keeping with the well established practice in the Magistrate's Court, that is, traditional jacket and tie for men". No other reason or explanation was given at that time.

19. However, in his affidavit the Chief Magistrate's clearly sought to expand on his explanation. First, he stated that his decision was based on "an unwritten convention ... that male attorneys suit themselves in jacket and tie". And therefore, that the Nehru suit worn by Mr. Khan "lowered the standard of the Court because he was deviating from the standard practice in the Magistrate's Court". Second, that in his view "the Nehru suit ... certainly did not lend itself to befitting the dignity of the Court", citing Rule 40 of the Code of Ethics for attorneys-at-law, which forms a part of the Legal Profession Act.

The Legal Profession Act and the Code of Ethics – Rule 40

20. The Legal Profession Act (LPA), Chapter 90:03 of the laws of Trinidad and Tobago,⁸ provides at section 35, in the section headed 'Discipline', as follows:

⁸ Act No. 21 of 1986, which came into operation on the 1st January, 1987.

- (1) The rules contained in the Code of Ethics set out in the Third Schedule shall regulate the professional practice, etiquette, conduct and discipline of Attorneys-at-law.
- (2) A breach of the rules in Part A may constitute professional misconduct and in Part B shall constitute professional misconduct.
- (3) Where no provision is made by the rules in respect of any matter, the rules and practice of the legal profession which before the commencement of this Act govern the particular matter shall apply in so far as is practicable.
- (4) The Council with the approval of the Chief Justice may amend the Third Schedule.

21. Rule 40 appears in the Third Schedule to the LPA, 'Part A' 'Code of Ethics', and is therefore a rule which if breached may constitute professional misconduct (not shall as in relation to the rules set out under 'Part B'). Further, Rule 40 comes under sub-category IV in Part A, headed "In relation to the Courts and the Administration of Justice". Rule 40 states:

An attorney-at-law appearing before the Court shall at all times be attired in such a manner as prescribed or agreed by the proper authorities and as befits the dignity of the court.

22. Court is not defined in the LPA, but it is in section 78 of the Interpretation Act as follows: "Court means any court of Trinidad and Tobago of competent jurisdiction". It therefore includes the Magistrate's Court and by extension the Coroner's Court. The LPA and Rule 40 constitute the primary legal context in which any analysis of the issues raised in this matter must be undertaken.

23. Judicial Review in Trinidad and Tobago is now governed by the Judicial Review Act (JRA).⁹ Section 5(3) of the JRA is illustrative of general grounds upon which a court may grant relief. From the Appellant's Statement filed in this matter and the relief and particulars

⁹ Act No. 60 of 2000, which was assented to on the 13th October, 2000 but came into operation on the 6th November, 2000.

contained in it, it is apparent that the Chief Magistrate's decision is being challenged on, inter alia, the grounds as stated in section 5(3) (a), (e), (g) – irrelevant consideration, (i) (k), (m) and (o) of the JRA.¹⁰

Interrogating The Chief Magistrate's Explanations

24. Taking both the Chief Magistrate's letter of the 2nd February, 2005 and affidavit of the 2nd November into consideration, it is clear that the Chief Magistrate relied on two bases for his decision of the 21st January, 2005 (and his subsequent refusal to change it) that the only attire that would permit a male attorney-at-law right of audience in the Magistrate's Court was "traditional jacket and tie for men". These were that:

- (i) wearing of the "traditional jacket and tie for men" was "the well established practice in the Magistrate's court" and "an unwritten convention"; and
- (ii) "the Nehru suit ... certainly did not lend itself to befitting the dignity of the court" – citing Rule 40 of the Third Schedule of the LPA.

25. It is only reasonable, given Rule 40, that every attorney-at-law duly admitted to practice law in Trinidad and Tobago, would have a legitimate expectation that if he (or she) was attired in a manner as prescribed or agreed by the proper authorities and as befits the dignity of the Court, he (or she) would be granted the right of audience before the Courts, all other things being equal. Rule 40, as both statutory law and regulation, constitutes a clear, unambiguous and unqualified representation that every attorney-at-law is entitled to rely upon.

26. It is agreed before this Court (and acknowledged by the Chief Magistrate¹¹), that the LPA does not specifically mention the mode of dress for attorneys appearing in the Magistrate's

¹⁰ Section 5(3) states: "The grounds upon which the court may grant relief to a person who filed an application for judicial review includes the following:

- (a) that the decision was in any way unauthorised or contrary to law;
- (e) unreasonable, irregular or improper exercise of discretion;
- (g) fraud, bad faith, improper purpose or irrelevant consideration;
- (i) conflict with the policy of an Act;
- (k) absence of evidence on which a finding or assumption of fact could reasonably be based;
- (m) deprivation of a legitimate expectation;
- (o) an exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised the power.

¹¹ See paragraph 6 of his affidavit.

Court. It is also agreed that in relation to the High Court the specific mode of dress has in the past been duly prescribed (and agreed).¹² Before this Court it was not seriously contended that there has been or is any prescribed specific mode of dress for attorneys-at-law appearing in the Magistrate's Court.

27. The question arises therefore, whether any specific modes of dress have been agreed in relation to the Magistrate's Court? It had been argued that the Chief Magistrate, by relying on an alleged "well established practice" and "an unwritten convention", was referring in fact to an agreement as to the proper attire to be worn in the Magistrate's Court. Indeed, this is what the trial judge concluded.¹³ However, the Chief Magistrate himself made no such explicit assertion and certainly did not peg his view of the "unwritten convention" that male attorneys suit themselves in jacket and tie to Rule 40 or to any agreement. His reasoning process was that the unwritten convention of jacket and tie constituted a "standard practice" and that the Nehru suit deviated from that standard, and thus constituted a "lowering of the standard of the Court".

28. Black's Law Dictionary (8th edition) defines a convention as "a generally accepted rule or practice, usage or custom". Which begs the question, whether there was and if so what was the convention as to attire in the Magistrate's Court in Trinidad and Tobago? Implicit in this question is another: when does a convention become a convention? And furthermore, can conventions change?

¹² On the 8th December, 1986 Chief Justice Clinton A. Bernard issued the following Practice Direction in anticipation of the commencement of the LPA:

It is notified for the information of all legal practitioners that with the coming into force of the Legal Profession act all Attorneys-at-Law who appear in open court must, as from the operative date of the Act, to wit, 1st January, 1987, appear in the attire now worn by Barristers-at-Law.

In open court in addition to black gown and white band the male practitioner should wear a pair of sober trousers and a black jacket and the female should be clad in black or grey attire preferably the former.

In the Chamber and Master's Courts the practitioner should be in sober attire such as for example black, grey, blue, white, brown.

And, in 1979 Chief Justice Isaac Hayatali declared in his address at the opening of the 1979 – 80 Law Year, that it had been agreed between Bench and Bar that the wearing of wigs in court (as per the British tradition) would cease with effect from the 8th October, 1979. Barristers were therefore to wear: "A black gown ... over a black jacket over a white shirt with soft or winged collars secured by white bands".

¹³ See pages 13 – 14 of the judgment.

29. As my brothers and I agree, the modes of attire in the Magistrate's Court have changed over time and with changing fashions, as is to be expected in the absence of any specific prescription or agreement (as with the High Court). For as far back as we can recount, men have worn a variety of clothes in the Magistrate's Court: suit cuts ranging from two piece suits to three piece suits; single-breasted and double-breasted; with single, double and triple buttoned jackets (and in the case of double-breasted jackets, with two rows of buttons); with narrow and broad lapels, notched and peaked, with high and low gorges; in all shades of black, grey, brown, blue and off-white; in every manner of cloth (solids, pinstripes and checks); and with single, double and no vents. In addition, plain jackets and trousers have been worn, including blazers with flannels. And on all jackets, every variety of pocket has appeared, from jetted, to flap, to hacking (diagonal), to patch. With all of the above, a variety of ties have been also worn, long ties (thin, broad) and bow ties, in every colour, shape, size and style. Further, men have appeared in the Magistrate's Court in waist coats only with band collars (like on a Nehru jacket) and bands and with ties, and in a variety of styles and cuts.

30. It is therefore quite incorrect to assert that there has been some strict adherence to a "traditional jacket and tie" mode of dress in the Magistrate's Court, whatever 'traditional' may mean! Certainly it has not meant uniformity. There has quite simply never been any specific agreed mode of dress for men in the Magistrate's court. However, if there has been one consistent, underpinning value and tradition, which one may truly deem an enduring and accepted convention, it was and is, that the attire worn in the Magistrate's Court would always "befit the dignity of the Court".

Attire befitting the dignity of the Court

31. In my opinion, this is the true and only consistent standard or convention with respect to attire in the Magistrate's Court in Trinidad and Tobago. It is not tied to any single way of dressing or style of dress, but rather to a value underpinning all ways and styles of dress. This appreciation is brought out clearly if one considers the attire worn by women in the Magistrate's Court over time. Women's attire in the Magistrate's Court has been even more varied than that of men. And it has also changed, quite dramatically at points, over time. There was a time when women never wore trousers to the Courts. Now they do. There was a time when a conventional

jacket was expected, even over a dress. Now that is no longer so and there is much more variety in what is considered a 'jacket'. Indeed, dresses per se are now also worn and there is no uniformity as to style, cut or cloth. Furthermore, saris have been worn in all the courts of the land, even in the High Court with advocates' collars and bands. And recently, Muslim women have been wearing hijabs in all the courts of Trinidad and Tobago, also with advocates' collars and bands.

32. Traditions change even as styles do, and have been changing in Trinidad and Tobago, as they must where there is no clear regulation or prescribed form. However, the convention and standard that court attire must always befit the dignity of the Court remains as the true standard of what is permissible. Thus, women's attire in the Magistrate's Court is now varied and includes culturally indigenous wear, but all of it has generally and consistently met the standard of "befits the dignity of the Court". Indeed, this standard and value has been codified in Rule 40 of Part A of the Code of Ethics, LPA.

The Chief Magistrate's Decision

33. What then of the Chief Magistrate's decision in the context of judicial review? In light of the above analysis and of section 3 of the JRA, I am of the following opinion. The Chief Magistrate's decision was contrary to law, unreasonable and an improper exercise of discretion, flawed because it was based on a misapprehension of relevant principles and because it failed to properly consider relevant considerations, in conflict with the policy of the LPA and the Code of Ethics, and deprived the Appellant of the legitimate expectation that if he were dressed in a manner that befits the dignity of the Magistrate's Court he would be granted the right of audience to which both he and his clients were entitled by reason of his admission to the Bar of Trinidad and Tobago.

34. The decision of the 21st January, 2005 and the refusal to revoke it when invited to do so, was contrary to law and in conflict with the policy of the LPA and in particular Rule 40 of the Code of Ethics, Part A. In the absence of any prescribed wear or agreement as to specific wear, Rule 40 properly interpreted in a natural, ordinary and common sense way, means that: "An Attorney-at-law appearing before the court shall at all times be attired in such a manner ... as

befits the dignity of the Court”. Indeed, even when court attire is prescribed or agreed it must also always be such that “befits the dignity of the Court”.

Context: Law, Society and Culture

35. The answer to the question as to what attire befits the dignity of the Court, requires a consideration of the contextual meaning of both ‘dignity’ and ‘Court’. Clearly, after 49 years of Independence and 35 years of being a Republic, ‘Court’ must be a Caribbean Trinidadian and Tobagonian Court - not an English Court. And, ‘dignity’ in this context must mean: of a state or quality that duly honours and respects the status of a Trinidadian and Tobagonian Court.

36. Thus, women dressed in the cultural attire of some Indo-Trinidadians and Tobagonians – the sari and the hijab, do not dishonor or disrespect the status of the Court because their wear deviates from what has traditionally been worn by women in the Courts from recollected memory. The true test is, does the sari or hijab in question befit the honour and respect duly afforded to a Trinidad and Tobago Court. Indeed, the converse is equally applicable, not just because someone is wearing ‘traditional wear’ means it will be befitting of the dignity of the Courts. And maybe equally importantly, what is ‘traditional wear’ in 2005 and 2011 in Trinidad and Tobago?

37. Clearly the Nehru suit worn by Mr. Khan on the 21st January, 2005 was a suit in all respects. Clearly in cut, colour and appearance it was ‘sober attire’ as prescribed by Chief Justice Bernard as clothing befitting the dignity of the Chamber and Master’s Court of the High Court. Clearly its collar was akin to the collars affixed to the waistcoats of advocates common in the High Court. Why then should the Nehru suit worn by Mr. Khan not befit the dignity of the Magistrate’s Court? Because it lacked a tie? Can there be any attire emerging from our indigenous Trinidadian and Tobagonian culture that may be befitting the dignity of our local Courts? If so, what attire?

38. Professor Bridget Brereton¹⁴ has recently explained in an article¹⁵ titled “Colonialisms in T&T¹⁶”:

For much of the 19th century, British influence on Trinidad’s culture was fairly limited, outside the realm of law and governance.

But gradually, the colonial government, the churches and the schools managed to spread the English language and British culture in the society.

Of course, the colony’s legal system, which had been Spanish, was gradually overhauled until, by the mid-nineteenth century, it was essentially English.

So like it or not, European influences derived from the colonial powers, Spain, France and Britain, have played a key role in the evolution of T&T’s culture and history.

39. Michael Harris has also recently written¹⁷ about cultural imperialism, explaining it as “a by-product of direct imperialism in which one nation dominated another, militarily or administratively, for the purpose of economic exploitation”. British colonialism was an instance of direct imperialism in the history of Trinidad and Tobago, with its exploitative slave and immigrant sugar plantations set up for unidirectional economic gain in favour of the colonizers and the British Empire.¹⁸ The by-product of such imperialist domination was a pressured and forced, an imposed, shaping of social and cultural values, structures and systems in conformity with the dominating center.¹⁹

¹⁴ Professor Emerita of History at the University of the West Indies, St. Augustine Campus.

¹⁵ Daily Express Newspaper, Thursday 10th November, 2011, page 12.

¹⁶ Tobago became a separate permanent internationally accepted British colony in 1803 – passing from the French, and Trinidad in 1802 – passing from the Spanish by formal treaty (in 1797 it passed by force of arms) and both were united as the British Colony of Trinidad and Tobago in 1889.

¹⁷ Trinidad Express Newspaper, November 6th 2011.

¹⁸ See Dr. Eric William, “Capitalism and Slavery”, 1944. And note, that though published in 1944 by the University of North Carolina, it was not published in the United Kingdom until 1964.

¹⁹ See Herbert Schiller, “Communication and Cultural Domination”, 1976; and Dowing, Mohammadi and Sreberny – Mohammadi (1995): “Imperialism is the conquest and control of one country by a more powerful one. Cultural imperialism signifies the dimensions of the process that go beyond economic exploitation or military force. In the history of colonialism the ... systems of many Third World countries have set up as replicas of those in Britain,

40. For our purposes culture may be taken to be the shared patterns of behaviours learned through a process of socialization. And cultural imperialism identifies and describes a context in which patterns of behavior are learned through imposed value systems and the resulting consequences, as occurred during British colonialism in Trinidad and Tobago. These imposed values also exert an attractive influence, whereby there is a tendency to uncritically adopt the dominant culture as the colonized seek identity and meaning, poignantly explained and described in V.S. Naipaul's "The Mimic Men" and "A Bend in the River".²⁰ Can there really be any true, free and independent meeting of minds or agreement in such a context? Can there be any authentic autonomous cultural identity, meaning and purpose? Maybe Naipaul captures the predicament of 'mimic men' pragmatically (even if overly pessimistically) in the following statement: "You mustn't think it's bad just for you. It's bad for everybody ... Nobody's going anywhere. We're all going to hell ..." ('A Bend in the River, 1980).²¹ Even if that was so then - in 1980, what of now?²²

France ... and carry their values. Subtly but powerfully, the message has often been insinuated that Western cultures are superior to the culture of the Third World".

²⁰ Penguin Books Limited, 1967 and Clarion Books, 1980 respectively. See also Homi Bhabha, "Signs taken for wonders: Questions of Ambivalence and Authority under a tree outside Delhi, May 1817," and "Of Mimicry and Man: The Ambivalence of Colonial Discourse" in *The Location of Culture* (citing Jacques Lacan) : "Mimicry reveals something in so far as it is distinct from what might be called an itself that is behind. The effect of mimicry is camouflage ... It is not a question of harmonizing with the background, but against a mottled background, of becoming mottled...". For Bhabha: "Mimicry conceals no presence or identity behind its mask. (Rather it is) a doubling, the part-object of a metonymy of colonial desire which alienates ... A desire that, through the repetition of partial presence, which is the basis of mimicry, articulates those disturbances of cultural, racial and historical difference that menace the narcissistic demand of colonial authority". Thus for Bhabha, postcolonial mimic men are authorized versions of otherness and part-objects of a metonymy of colonial desire, marked by a dichotomy of 'self' v 'other', that results in a condition of ambivalence, uncertainty and contradiction. The problematics of mimicry lies in the fact that it 'repeats rather than re-presents', and in the acts of repetition denies originality. The assertion of true identity and therefore of authentic purpose and meaning, remains hidden under the angst of an alien culture – and so lost to self and society. See also Albert Memmi (*The Colonizer and the Colonized*, 1957), for whom the effect of colonial imperialism has been the rejection (by the colonized) of the colonized's own culture and values – hence a stripping and loss of identity, in favor of that of the colonizer's. Contrast, Bill Ashcroft (*Post Colonial Studies: The Key Concepts*, 2005), who contends that culture is a dynamic force that is always in a condition of absorption and production, and therefore all cultural interactions indelibly change both participants, irrespective of the nature of the relationship.

²¹ Naipaul also offers a diagnosis and a challenge: "I hadn't understood to what extent our (colonized local) civilization had also been our prison. We simply accept (the Outside World). We have grown up paying tribute to it ... It never occurs to us that we might make some contribution to it ourselves. And that is why we miss everything." (*A Bend in the River*, 1980).

²² West Indian intellectual, Norman Girvan, in his remarks at the launch of 'The Thought of New World: The Quest for Decolonisation' in October 2010, stated: "Naipaul's Mimic Men never died, they-we-just reinvented ourselves... . What is the problem (for what he calls "this kind of dependency syndrome")? It all seems to boil down to a debilitating lack of collective self-confidence", which for Girvan "all starts in the mind". Therefore he posits: "Psychological decolonisation is the basis of all other forms of decolonisation".

41. Trinidad and Tobago is no longer a British Colony, nor even an Independent Nation with the British Monarch as Head of State, but a Republic! What befits the dignity of a Trinidad and Tobago Court must be considered in this context and in the further context of the legitimate assimilation (and re-appropriation) and expression of authentic indigenous cultural identities and meaning, freely assumed, and which are no longer shackled to British colonial and imperialist norms in acts of masked mimicry.²³

42. Traditions may change, but standards and values can remain constant. Mr. Khan's Nehru suit is such an example. Though not the "traditional jacket and tie," it is nevertheless respectful of the honour and dignity that is due to a Trinidad and Tobago Magistrate's Court. Indeed, one may say it was in every respect like the saris and the hijabs worn in the Courts of Trinidad and Tobago, culturally decorous in relation to Court appearance and attire.

43. In my opinion no reasonable person, exercising the power and discretion that the Chief Magistrate had to regulate proceedings in his court²⁴, would have concluded that the Nehru suit worn by Mr. Khan on the 21st January, 2005 either lowered the standard of the Court or was not befitting the dignity of the Court. The exercise of the Chief Magistrate's discretion and power to deny Mr. Khan the right of audience was therefore unreasonable and improper. Moreover, the exercise of the discretion was flawed because it failed to consider the circumstances that I have outlined above, both in relation to general context and in relation to the range of wear by both men and women in the Magistrate's Court and how it has changed over time. If he had considered these relevant factors, the Chief Magistrate would have drawn the reasonable

²³ Here mimesis is descriptive of an abandoning or separation of the authentic self from itself, which is effective as a lure for the onlooker only by concealing the split between true identity and the assumed mask that is worn for acceptability. It is, *inter alia*, in light of this mimicry and the prior dehumanizing stripping of identity, which are the undeniable effects of colonial and cultural imperialism, that Frantz Fanon (*The Wretched of the Earth*, 1961) urges colonized peoples as follows:

Let us decide not to imitate Europe; let us combine our muscles and our brains in a new direction. Let us try to create the whole man, whom Europe has been incapable of bringing to triumphant birth.

Humanity is waiting for something other from us than such an imitation, which would be almost an obscene caricature.

But if we want humanity to advance a step farther, if we want to bring it up to a different level than that which Europe has shown it, then we must invent and we must make discoveries.

For Europe, for ourselves and for humanity, we must turn over a new leaf, we must work out new concepts, and try to set afoot a new man.

²⁴ See *O'Toole v Scott* (1905) AC 939 at 959, per Lord Pearson.

inference that the true convention about attire in the Magistrate's Court is that it must befit the dignity of the Court. His confusion between dress style and tradition on the one hand and true institutional convention, standards and values on the other, led him to the erroneous proposition that a change or deviation in style from that which he knew amounted to a lowering of standards in court attire. No decision maker acting reasonably and properly informed could have reached this decision in Trinidad and Tobago.

44. In this case the Chief Magistrate was invited (on the 27th January, 2005) to reconsider his position and decision of the 21st January, 2005 by letter from Mr. Khan, that brought to his attention, in Mr. Khan's inimitable style, much of what I have set out above, including the centrality of Part 40 to this issue. He also had the benefit of several letters and articles in the printed media, most of which supported the position that Mr. Khan's Nehru suit befitted the dignity of the Court; including an editorial in the Trinidad Guardian of the 28th January, 2005, entitled "Making an Issue of Courthouse Clothes," which stated of Mr. Khan:

He is asserting the cultural right of counsel to wear heritage clothes, at least in the Magistrate's Court, as against "colonial apparel like a tie".

Of course, Mr. Khan has a point. Forms, including forms of dress, formalities, procedures, practices, rules etc, the legacy of colonial times, are overdue for review.

Yet despite this information the Chief Magistrate insisted on upholding his decision of the 21st January, 2005.

45. Finally, in so far as the Chief Magistrate proffered as a basis for his decision the opinion that the Nehru suit worn by Mr. Khan "certainly did not lend itself to befitting the dignity of the court" (citing Rule 40 of Part A, of the Code of Ethics, LPA), but gave no explanation for why he was of this opinion, his opinion is open to the legitimate criticism of being subjective, arbitrary and irrational. Indeed, for all of the reasons given above I am of the opinion that it is such. In my opinion a distinction needs to be made between personal morality – the integrity of which lies in the alignment between personal beliefs and values on the one hand and behavior on the other, and professional ethics – the integrity of which lies in the alignment between

institutional rules, principles and values on the one hand and behavior on the other. The sources of personal morality and institutional ethics are different; the former being clearly subjective and the latter objective. In this case the Chief Magistrate was duty bound to give due and rational consideration to Rule 40 of the Code of Ethics as a source of information and authority before making his decision. There is no evidence that he did so on the 21st January, 2005 or for that matter, even on the 2nd February, 2005.

Conclusion

46. For these reasons I agreed with my fellow judges (Mendonca, J.A. and Narine, J.A.) on the 4th November, 2011, that the Nehru suit worn by Mr. Khan on the 21st January, 2005, in the colour and tailored as it was, is befitting the dignity of the Magistrate's Court, and therefore quashed the impugned decision of the Chief Magistrate made on the 21st January, 2005. I also agreed that the "proper authorities" referred to in Rule 40 of Part A, Code of Ethics, LPA, should forthwith take the necessary steps to prescribe or agree for all attorneys-at-law the appropriate attire for wear in the Magistrate's Court, as has been done in the past for the High Court. In this way unnecessary confusion and disagreement (and what some persons fear and have named "a descent into chaos") can be avoided and the true business of the Courts can be dealt with without unnecessary distractions. Indeed, this is the only responsible way forward.

P. Jamadar
Justice of Appeal

I have read the judgment of P. Jamadar, J.A. and for the reasons given I agree that the decision of the Chief Magistrate made on the 21st January, 2005 be quashed.

R. Narine
Justice of Appeal