[2010] UKPC 12
Privy Council Appeal No 0102 of 2009

JUDGMENT

Devendranath Hurnam *v* Kailashing Bholah and Soobashsing Bholah

From the Supreme Court of Mauritius

before

Lord Phillips
Lord Rodger
Lord Walker
Lord Brown
Lord Clarke

JUDGMENT DELIVERED BY
Lord Rodger
on

12 July 2010

Heard on 30 April 2010

Appellant
Dev Hurnam

(In person)

Respondent
Not represented

Intervener
Satyajit Boolell DPP
Imran Afzal

(Instructed by Royds LLP)

LORD RODGER:

1. In August 2003, the appellant, Mr Hurnam, then a well-known practising barrister, was convicted in the Intermediate Court of a charge of conspiring with his former client, Soobashing Bholah ("Soobash"), to hinder police in an enquiry regarding a larceny at the Grand Bois State Bank on 4 May 2000 by fabricating an alibi for Soobash to mislead the enquiring officers. At the trial the crucial evidence against the appellant, which the magistrates accepted, was given by Soobash. Mr Hurnam appealed against his conviction and the Supreme Court allowed his appeal on the ground that the prosecution had failed to prove the necessary intent: 2004 SCJ 91; 2004 MR 43. The State appealed to this Board which allowed the appeal and restored the conviction: *Director of Public Prosecutions of Mauritius v Hurnam* [2007] UKPC 24; [2007] 1 WLR 1582.

2. On 2 July 2003, i e, before the magistrates had given their verdict in the criminal trial against him, by plaint with summons Mr Hurnam began civil proceedings in the District Court of Grand Port. At that stage the defendants included the then Director of Public Prosecutions and the police officers who had conducted the criminal investigation against him, plus Soobash and his brother, Kailashing Bholah ("Kailash"). It is unnecessary to go into those proceedings since, after prolonged procedure and after default had been recorded, Mr Hurnam decided to put Soobash and Kailash out of those proceedings. Due notice of the motion for désistement d'instance to be heard on 20 June 2008 was given to them on 6 May 2008.

3. In the meantime, by plaint with summons dated 28 March 2008, Mr Hurnam had begun the present proceedings in the District Court of Grand Port against Kailash and Soobash for a judgment condemning and ordering the defendants jointly and in solido to pay him the sum of Rs 50,000 by way of damages. The damages are for damage and prejudice which he alleges he suffered as a result of Soobash falsely saying that Mr Hurnam had told him to lie in order to set up an alibi that he had been at the vehicle testing centre at the time of the bank robbery. He likewise claims damages for damage and prejudice which he alleges he suffered as a result of Kailash saying that Mr Hurnam had taken two sums of money which he knew were the proceeds of crime. More particularly, Mr Hurnam avers that, as a result of the defendants' false and malicious allegations, which constitute faute, he has suffered damage and prejudice "in the sum of Rs 5 million which sum he voluntarily reduces to Rs 50,000 to meet the jurisdiction" of the

District Court. Kailash and Soobash have not been represented or taken any part in the proceedings.

4. Having heard evidence, on 4 November 2008, the District Magistrate, P D Mauree, held that Mr Hurnam had failed to prove his case against the defendants on the balance of probabilities and dismissed the case against them. Mr Hurnam appealed to the Supreme Court but, in a judgment dated 3 August 2009, the Supreme Court (Domah and Angoh JJ) dismissed the appeal.

5. On 10 August 2009 Devat J granted Mr Hurnam leave to appeal to the Board. Subsequently, on 10 March 2010 the State applied to be allowed to intervene to argue that the present action amounts to a collateral attack on the final decision of the Intermediate Court, whose findings were upheld by both the Supreme Court and this Board. Such a collateral attack, it was submitted, is contrary to public policy and amounts to an abuse of process. Shortly before the appeal came on for hearing, the Board decided that it should hear argument on the State's intervention. The issues were succinctly and clearly set out in a written submission prepared by junior counsel for the State, Mr Afzal, which served as a basis for the oral submissions by counsel for the State to which Mr Hurnam responded. Having heard the argument, the Board decided to postpone hearing any argument on the substance of the appeal until it had determined whether the present civil proceedings constitute an abuse of process.

6. In order to deal with the matter, their Lordships must refer in more detail to the criminal proceedings against Mr Hurnam and to the averments in the present civil proceedings.

Criminal Proceedings

7. So far as the criminal proceedings are concerned, their Lordships can do no better than begin by quoting part of the account which Lord Carswell gave in the Board's judgment in *Director of Public Prosecutions of Mauritius v Hurnam* [2007] 1 WLR 1582, 1584-1586, paras 2-12. In the excerpt Lord Carswell refers to Soobash as "Bholah", to Kailash as "Kaylashing", and to Mr Hurnam as "the respondent":

> "2. On 4 May 2000 about 2 pm an armed robbery involving a number of persons was carried out at the State Commercial Bank in Grand Bois. About 6 pm that day two brothers were arrested on

suspicion of complicity in the robbery, Bholah and his brother Gangaramsingh Bholah. Bholah was taken to Rose Belle police station, arriving about 7.30 pm, and there he was questioned during the evening. According to the evidence given by Bholah, although interviewed for a period put at some two hours in all, he declined to answer questions that evening, stating that he had a headache and would make a statement later. He was transferred in the late evening to Nouvelle France station, where he arrived at 12.25 am on 5 May.

3. The respondent was contacted that night by another Bholah brother, Kaylashing, and attended Nouvelle France station about 12.10 pm on 5 May, together with two colleagues, Messrs Hawaldar and Hurhangee. The respondent saw Bholah between 12.37 pm and about 1 pm. Bholah said in his evidence that he told the respondent that he had committed the robbery with other persons. He told the respondent during part of this interview, when, as the Intermediate Court found, he and the respondent were alone together, that his brother Gangaramsingh had taken a lorry for a 'fitness test' at Curepipe the previous day, whereupon the respondent, according to Bholah, told him not to relate anything to the police about the hold-up, or he would be sentenced for a long period, and said that he would free all of them, 'tire zotte tout'. The respondent's case, on the other hand, as set out in his police statement and his evidence at trial, was that Bholah at that first interview denied committing the robbery and instructed him that he had been at the NTA fitness centre at the material time. According to the respondent's account Bholah also said that he had told the police this on the previous evening 4 May.

4. Bholah appeared along with other suspects in the District Court at 2.45 pm on 5 May, with the respondent present, and was remanded. A record appears in the court note:

> 'Accused 1 [Bholah] and 2 states that they have given their statement/s. Accused 3 states he wishes to give statement in presence of counsel.'

5. About 6 pm on 5 May Bholah gave a statement to Inspector Lisette, who recorded it in writing. The respondent was present during the taking of the statement. In that statement Bholah stated that on 4 May 2000 he and his brother Gangaramsingh took a lorry for a fitness test at the NTA Curepipe. He arrived at the test centre at about 1.45 pm and left at about 2 to 2.15 pm. After returning home he was called out to help with another brother's bus, which had broken down on the road and had to have a part obtained. He obtained the part and eventually arrived home about 5 pm. The police came about 6.30 pm and took Gangaramsingh and himself to Rose Belle station. He was questioned about his movements that day

and ‘mo ti explique zottes pareil couman mo fine dire’, ‘I explained to them just as I said.’

6. The respondent obtained from Kaylashing Bholah the certificate of fitness relating to the lorry examined at the test centre on 4 May and brought it to the police station. The certificate confirmed that the lorry had been at the centre on 4 May, but it did not state the precise time or the names of any persons who had brought it there.

7. On 8 May 2000 Bholah was released on bail and he was interviewed by police officers again on 12 and 16 May. On 14 June he made another written statement, which he followed by further statements on subsequent dates. In his statement of 14 June he said that his previous statements did not contain the whole truth and that he now wished to tell the truth. He claimed that a co-accused Meetoo had threatened to kill his family if he told the truth to the police. He confessed to taking part in the robbery at the bank at Grand Bois, his function being to drive one of the getaway vehicles. He went on to say that when the respondent came to see him on 5 May he related to him all about his participation in the hold-up. He said that the respondent told him to lie and to tell the police that his brother Fadoo (a name by which Gangaramsingh was known) and he went together to have the lorry tested.

8. The respondent continued to represent Bholah at three hearings in the Intermediate Court, but on 24 July 2000 Bholah told the court that he would no longer retain his services. On 27 June 2001 he pleaded guilty to aiding and abetting the robbery and was sentenced to four years’ penal servitude.

9. The respondent was charged on a provisional information on three charges, two of receiving stolen property (which appear to have related to fees received by him, allegedly paid out of the proceeds of the robbery) and one of conspiracy to hinder police. The prosecution entered a *nolle prosequi* on the receiving charges on 1 April 2002. The particulars of the conspiracy charge on which he was tried were:

> ‘That on or about 5 May 2000 at Nouvelle France in the District of Grand Port, the said Devendranath Hurnam did wilfully and unlawfully agree with another person, to wit one Soobashing Bholah to do an unlawful act to wit: to hinder police in an inquiry regarding a larceny committed at the Grand Bois State Bank on 4 May 2000 by fabricating an alibi for the said Soobashing Bholah to mislead the inquiring officers.’
>
> …

10. The trial took place in the Intermediate Court before three magistrates, Mrs R Mungly-Gulbul, Mr D Chan Kan Cheong and Mr D Vellien. After some preliminary skirmishes the respondent was arraigned on 13 November 2001 and pleaded not guilty to all three

charges. Following some postponements the taking of evidence began on 1 April 2002 and the trial continued sporadically over many hearing days until judgment was given on 11 August 2003. The main prosecution witness was Bholah, who was cross-examined at length. At the close of the prosecution case the defence made a submission of no case to answer, based mainly on the proposition that Bholah had told the police on 4 May 2000 about his supposed alibi, and therefore the respondent could not have fabricated it on 5 May. That submission was rejected by the magistrates.

11. The respondent gave evidence in his defence, to the effect that his instructions from Kaylashing Bholah and from Bholah himself had been all along that Bholah had been at the fitness centre on 4 May at the time of the hold-up. Bholah had not confessed to him his complicity in the robbery and the respondent had not fabricated any alibi for him. In the course of his cross-examination of the respondent prosecuting counsel put a number of matters to him concerning a previous conviction and also his suspension from practice in 2001 for a disciplinary offence.

12. Following further evidence and counsel's closing submissions the Intermediate Court gave a written judgment on 11 August 2003. In the judgment the magistrates considered submissions advanced by the respondent alleging unfairness in a number of respects, which they rejected, then went on to consider the evidence in detail. They accepted the evidence given by Bholah as being truthful, giving themselves a proper direction and warning about the danger of acting on the uncorroborated evidence of an accomplice. They rejected the defence contention that Bholah had already raised the alibi on 4 May when questioned by the police. They rejected the respondent's version as untrue, notwithstanding the "skill and aplomb", as they described his evidence, with which he gave his answers in court. They accordingly found the elements of the charge established beyond reasonable doubt."

8. Although their main concern was the appeal by the prosecution, the Board recorded that the topic which occupied the major part of the argument of Mr Hurnam's counsel was an attempt, in support of his cross-appeal, to discredit the findings of fact made by the Intermediate Court and affirmed by the Supreme Court. The Board carefully considered all the points raised by counsel, but its conclusion, at para 24, was that "a sufficient case [had] not been made out for it to disturb the concurrent findings of fact."

9. The Board went on to say that, after they had reserved judgment, the solicitors acting for Mr Hurnam had sent a letter asking for certain additional evidence to be brought to the Board's attention, with the suggestion that his cross-

appeal should be re-opened. The Board rejected that suggestion and gave their reasons for doing so, at paras 25-27:

> "The additional evidence consists of a signed statement made by Bholah to the police on 10 March 2007 in connection with police inquiries into a robbery at the State Bank at Rose Belle on 8 December 2006. In this statement Bholah referred to his earlier arrest in connection with the hold-up at the State Bank of Grand Bois and said that he had "told the CID officers that on the day and at the time the hold-up took place, we took our lorry for fitness test at Curepipe". This, it is suggested, shows that Bholah had fabricated the false alibi when he was first arrested, before he spoke to the respondent, and refutes the charge that the respondent was involved in concocting the false alibi. There is nothing on the face of this additional evidence which necessarily undermines Bholah's oral evidence given against the respondent at his trial. Nor would their Lordships readily draw an inference from Bholah's recent statement that he is now in fact admitting to having given the false alibi on the very day of his arrest and before, therefore, he saw the respondent. This would necessarily involve him in admitting perjury throughout the long course of the proceedings against the respondent and would need to be stated very plainly indeed.
>
> 26. The solicitors for the Director of Public Prosecutions point out in response that Bholah does not in his new statement state when he gave the false alibi. In particular, he does not state that he gave the false alibi on the day he was arrested.
>
> 27. Their Lordships have considered this further material, but have reached the view that there is no occasion to reopen the hearing of this appeal to the Board."

10. Despite the fact that the Board had refused to re-open the cross-appeal on the basis of the additional statement by Soobash dated 10 March 2007, Mr Hurnam returned to the Supreme Court and applied by way of motion for an order directing the re-opening of the criminal case. The application was based in part on the same additional statement and in part on a further statement by him dated 20 March 2007. In their judgment dated 18 May 2007 the Supreme Court (Balancy and Caunhye JJ) held that, since the Privy Council had declined to re-open the cross-appeal on the basis of the statement dated 10 March, the application could only be based on any evidence which had come to light subsequently. The Supreme Court held that Soobash's new statement of 20 March merely confirmed what he had said on 10 March and that no new evidence had been adduced. In addition, in yet another statement, dated 21 March 2007, Soobash had reiterated the version which

he had given at the trial. The court accordingly set aside the application to re-open the criminal proceedings.

The present civil proceedings

11. Their Lordships must now give some account of Mr Hurnam's case in the present proceedings. The praecipe contains a rather discursive narrative, but for present purposes what matter are the core allegations on which he bases his case for damages against Kailash and Soobash.

12. As Lord Carswell explained, following the hold-up on 4 May 2000, Soobash and another brother, Gangaramsingh Bholah, alias Fadoo ("Fadoo"), were taken into custody later on the same day. They were questioned and then arrested and detained at Nouvelle France and Rose-Belle police stations respectively. The following day, Kailash retained Mr Hurnam's services on behalf of his two brothers. (At this stage Kailash was at liberty, but, subsequently, around 18 May, he himself was arrested in connexion with the hold-up.)

13. Mr Hurnam alleges that Kailash told him at the outset that his brothers were not involved in the hold-up "as they were at the material date and time … at the Forest Side fitness centre for the examination of the family lorry BS294." Mr Hurnam went to the Nouvelle France police station where he eventually gained access to Soobash. Mr Hurnam avers that, in company with two other barristers, he interviewed Soobash who denied involvement in the hold-up. He further avers that Soobash went on to tell him that "following his arrest and that of his brother Fadoo on 4 May 2000, both of them were questioned by the police and both had informed the police that, on the material date and time of the bank hold-up, they had been to the Forest Side national Transport Authority's fitness centre for the examination [of the] family lorry BS 294." He avers that he asked Kailash for the test certificate and that it was brought within a short time. He then had a further interview with Soobash.

14. Mr Hurnam did not meet Fadoo on 5 May. But he avers that, in a statement recorded on that date, Fadoo confirmed that on 4 May he was in the company of Soobash at the fitness centre at the time of the hold-up. He further avers that Fadoo also confirmed that, during questioning by the police on 4 May, he had informed them that he and Soobash had been to the fitness centre at that time. Mr Hurnam goes on to aver that he attended a bail hearing on 8 May when Soobash was released on bail. He alleges that Fadoo confirmed that, immediately before his arrest, he had told the police that he and Soobash were at the fitness centre at the time of the hold-up. Soobash was subsequently re-arrested and then released again. Mr Hurnam avers that Soobash was arrested once more at the beginning of

June and a provisional charge of conspiracy to commit aggravated larceny was preferred against him.

15. Mr Hurnam then avers that, while in custody after being re-arrested, Soobash gave the police a written statement on 14 June, in which he said, in effect, that he had not told the truth during the police enquiry because of threats by his alleged co-conspirator. Then come crucial averments (paras 22-27) which must be set out verbatim:

> "Plaintiff avers that it was in the same aforesaid statement [Soobash] further stated that he had a guilty conscience; it was in his interest to co-operate with the police and to tell the truth, the more so as some culprits who had committed the aforesaid bank hold-up were still at large whilst he was denied bail.
>
> [Soobash], thereafter, in the same aforesaid statement, gave a detailed account of his participation in the said bank hold-up and at the end of his statement he was prompted by the police to answer the following question:
>
> > 'Apres ca qui fine arriver?'
> >
> > 'After this what happened?'
>
> It was then and only then that [Soobash] made a false and malicious allegation against plaintiff to the effect that it was plaintiff who had instructed him to lie to the police when he was interviewed by plaintiff on 5 May 2000 at Nouvelle France Police Station and the following appears in his written statement:
>
> > 'La Avocat Dev Hurnam dire moi qui pou tire moi dans ca case hold up la, mo bizin cause menti et dire comme quoi Fadoo et moi qui ti alle fitness center…'
> >
> > 'Counsel Dev Hurnam told me that in order to get me out in the case hold-up [perhaps, better, "to get me out of this hold-up case"], I have to lie and tell as if Fadoo and I who had been at the fitness centre.'
>
> Plaintiff further avers that [Soobash] falsely and maliciously made the aforesaid allegation against plaintiff after he had informed his mother on or about 9 June 2000 to retain services of another barrister.
>
> Plaintiff further avers that the enquiring officer Ghoorah was instrumental in [Soobash] making the aforesaid allegation. [Soobash] was further promised that his charge and that of his brother, [Kailash], would be reduced and the relatives of this latter who were arrested by the police and who had confessed to possession and or knowingly receiving stolen property would not be

> prosecuted. And there was the possibility that he would be admitted to bail and no further action would be taken in respect of his second bail. Plaintiff has now ascertained that these promises have been kept in return for the false allegations made against plaintiff by both defendants. [Soobash] was in fact admitted to bail and the then DPP did not apply to the Supreme Court to have the ruling of the court set aside.
>
> Plaintiff further avers that [Soobash] made yet another false and malicious allegation against plaintiff in the course of plaintiff's trial before the Intermediate Court when he falsely stated that on 6 June 2000, whilst in police custody, he telephoned plaintiff and that this latter had allegedly asked for a sum of Rs 50,000 to remit same to a potential witness in order to maintain his alibi defence. Plaintiff avers the acts and doings of [Soobash] constitute faute."

16. So far as the first defendant, Kailash, is concerned, Mr Hurnam avers that, after Kailash had been arrested, on 4 June he agreed to give a statement, without his barrister being present. Mr Hurnam avers that Kailash began:

> 'Mo fine reste dans cachot plus qui vingt-cing jours, mo conscience fine reproche moi et azordi mo fine decide pour cause la verite.'
> 'I have been detained in police cell for more than twenty-five days; my conscience has reproached me and today I have decided to tell the truth.'

According to Mr Hurnam, in this statement Kailash confirmed that Soobash and Fadoo went to the fitness centre with the lorry on the day and at the time of the hold-up. Kailash also denied the charge put to him in connexion with that hold-up. Mr Hurnam avers that the record of the statement includes the following:

> "Q Est-ce qui a Nouvelle France avocat Dev Hurnam ti dire jotte bisin papier fitness pour capave tire Bango depuis dans case hold-up et qui ou ou fine dire Mahen alle cherche papier fitness a Mare Tabac?
>
> Q Is it so at Nouvelle France barrister Dev Hurnam had told you all fitness paper was required in order to be able to get Bango out in the hold-up case and that you told Mahen to get fitness paper from Mare Tabac?
>
> R Oui, avocat Dev Hurnam ti dire alle cherche papier fitness pour guetter si vraimeme camion ti alle fitness – mais li pas ti dire qi pour bisin tire Bango dans case hold-up.

A Yes, barrister Dev Hurnam did tell to get the fitness paper to see whether in truth the lorry had been taken for getting its fitness – but he did not say that same was needed to get Bango out of the hold-up case."

Mr Hurnam then avers that the police objected to bail. The matter was listed for continuation until 14 June.

17. On that date, Mr Hurnam avers, Kailash was taken to Souillac CID office where a further statement was recorded in which he said that he had not told the police the whole truth and that he now intended to tell the whole truth. He also said that he would not retain counsel to assist him. According to Mr Hurnam Kailash said:

Astere la mo conscience pereproche moi. Mo fine realise qui li pour dans mo l'interet pour mo cause tout la verite.
"Now my conscience is reproaching me. I have realised that it would be in my interest to tell the whole truth."

Mr Hurnam then avers:

"And for the first time *ever* since the hold-up and his continued detention, [Kailash] confessed his participation in the bank hold-up. At Folio 200207 counsel for [Kailash] stepped in to assist him in the enquiry and counsel was informed by the police that 'his client does no more want to retain his services'. In the said statement, defendant for the first time made a false and malicious allegation to the effect that he had handed over a sum of Rs 25,000.00 to plaintiff who had allegedly told [Kailash]:

'Pas faire narien, to ena l'argent hold up, to capave paye moi avec ca meme…'

'Does not matter, you have money from the hold up, you can pay me with same.'

Plaintiff avers that [Kailash] never handed any sum to him personally but paid a sum of Rs 5,000 to the Head Clerk and signed such payment in a register which gave him a lie. The charges for knowingly receiving stolen property were discontinued on 1 April 2002.

In the same further statement, [Kailash] made another false and malicious allegation to the effect that:

'Dev Hurnam fine dire qui li pou servi ca papier la pour faire Bengo donne l'enquette la police comme quoi li avec Fadoo

> et Bengo qui ti alle fitness a Forest Side dans camion BS 294….'
>
> 'Dev Hurnam told me that he would use this paper for Bengo [i e Soobash] to give his statement to the police to the effect that he [Bengo] and Fadoo who had been to fitness at Forest Side in lorry BS 294.'
>
> This allegation is in complete contradiction with the version contained in his statement of 4 June 2000…."

Although the matter is of no significance for present purposes, the Board notes that the translation of the last passage is slightly inaccurate: the allegation was that Mr Hurnam had told him that he would use the paper for Soobash to give his statement to the police to the effect that he (Kailash), with Fadoo and Soobash, had been to the vehicle fitness centre.

18. Mr Hurnam goes on to aver that these false and malicious allegations were made by Kailash following various promises made to him by the police and that he has ascertained that the promises were kept by the police who waived their objection to bail for Kailash. He was then admitted to bail without any further hearing.

19. Mr Hurnam summarises his contentions in this way:

> "Plaintiff avers that as a result of the acts and doings of both defendants, he has suffered tremendous damage and prejudice in his capacity of politician, in his professional capacity and in his private life."

20. He then adds that he now avers:

> "that on 10 and 20 March 2007, [Soobash] gave two statements wherein he confirmed that the alibi was invoked by him on the day of the bank hold[-up] [4 May 2000] when he was questioned by the police after he was brought along together with his brother Fadoo for enquiry by the police.
>
> Plaintiff further avers that [Soobash] has also confirmed to one of his then cell mates, one Chandraduth Lowtoo that he had made the aforesaid false allegations."

21. During the trial of the action Mr Hurnam himself led the evidence of Mr Chandraduth Lowtoo in relation to the last of these averments. The questions and answers, with the English translation, were as follows:

> "Q Monsieur Lowtoo, le 16 May 2001 ou ti condamné par la Cour et ou ti renter dans Prison Beau Bassin?
>
> Q Mr Lowtoo, on 16 May 2001 you were convicted by the court and you were admitted to prison at Beau Bassin?
>
> R Oui.
>
> A Yes.
>
> Q Pendant ou sejours dan Prison Beau Bassin, est ce ki ou fine rencontre aine dimoune ki apele Soobash Bholah alias Bango?
>
> Q During your detention at Prison Beau Bassin, did you meet a person under the name of Soobash Bholah alias Bango?
>
> R Oui, nous fine faire cachot ensemble.
>
> A Yes, we were in the same cell together.
>
> Q Oui, et ou capave dire ki fine arrive, ki ou ine tende, oune cause lors allegation ki ti faire contre moi?
>
> Q Yes, and can you say what happened, what you heard, you spoke about an allegation that was made against me?
>
> R Oui, parceki oune joure so mama, oune insulte so mama. La cause ca li pas ine d'accord. Ki line envie tire ou robe lors ou.
>
> A Yes, because you swore his mother, you insulted his mother. Because of this, he did not agree. That he wished to debar you [get your barrister's gown].
>
> Court: Line envie quoi?
>
> He wished what?
>
> Witness: Line envie ki ca Missier la paye ca consequence ki line joure so mamala.
>
> He wished that this man pays the consequence of having sworn/ insulted his mother.
>
> Q Et ki maniere?
>
> Q In what manner?
>
> R Faire ou nepli vine avocat.
>
> A Be disbarred."

22. The case against the defendants which emerges from these averments can be summarised quite shortly.

23. On 5 May 2000 Kailash asked Mr Hurnam to represent his brothers, Soobash and Fadoo, who had been taken into custody in connexion with the bank hold-up the previous day. He told Mr Hurnam that they had not been involved and that they had an alibi: they had been in their lorry at the vehicle fitness centre at the relevant time. Mr Hurnam agreed to represent Soobash and Fadoo and asked Kailash to obtain the certificate relating to the lorry as support for the alibi. Eventually, however, Soobash decided to change his representation and, on 14 June, in return for undertakings by the enquiring police officer, Soobash gave a statement in which he falsely said that Mr Hurnam had told him that, in order to get out of the hold-up allegation, he should lie and say that he and Fadoo had been at the test centre. In addition, at his trial Soobash said that, while he was in custody, Mr Hurnam asked him for Rs 50,000 to be given to a potential witness.

24. So far as Kailash is concerned, the allegation is that, again on 14 June, he falsely told the police that he had given Mr Hurnam Rs 25,000. Mr Hurnam had said to him that he (Kailash) could pay him the sum out of the money he had got from the hold-up. In the same interview Kailash said that Mr Hurnam told him that he would use the test certificate so that Soobash would be able to give the police his (false) statement to the effect that he and Fadoo had been at the fitness centre at the time of the hold-up.

25. In advancing his claim Mr Hurnam relies on Soobash's statements of 10 and 20 March 2007 and on the fresh evidence of Mr Chandraduth Lowtoo as to what Soobash is supposed to have said, about getting his own back on Mr Hurnam, when Mr Lowtoo and Soobash were together in the same cell.

26. The reaction of the Supreme Court to the idea that the civil court should be asked to reach a different conclusion after the Intermediate Court unequivocally rejected Mr Hurnam's version of his discussion with Soobash during his first interview with him on 5 May is instructive and important:

> "It would be preposterous on our part in the light of what the Intermediate Court found and what the Supreme Court decided, supported by what the Judicial Committee endorsed as regards the '*truthfulness of [Soobash's] account*' to reopen the debate on an issue already determined" (the Supreme Court's emphasis).

Abuse of Process

27. This observation of the Supreme Court really provides a suitable stepping off point for considering the State's intervention in this action, arguing that the action constitutes an abuse of process. In effect, the State contends that it is an

abuse of the process for Mr Hurnam to raise civil proceedings whose purpose is to mount a collateral attack on his conviction in the criminal proceedings before the Intermediate Court - a conviction which was affirmed on appeal both by the Supreme Court and by this Board.

28. In advancing that argument the DPP relied, in particular, on the well-known decision of the House of Lords in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. The appellant was one of six men who had been convicted of 21 charges of murder arising out of two bombings in Birmingham in 1974. At their trial the Crown had relied, in part, on statements which the men were alleged to have made to the police while in custody in November 1974. The men challenged the admissibility of the statements on the ground that they had been induced by violence and threats by the police. After a voir dire lasting some 8 days, the trial judge admitted the statements. Their appeals against conviction (which did not relate to the admissibility of the statements) were dismissed. Hunter (and the other five men) then brought a civil action of damages against two chief constables for assaults causing them physical injuries which they alleged had been inflicted on them by police officers when they were in custody in November 1974. In other words, the allegations of assault which had been rejected by the trial judge after the voir dire, and which must also have been rejected by the jury at their criminal trial, formed the basis of the actions of damages brought by Hunter and the other men. The plaintiffs wanted to reinforce their case by introducing some evidence which had not been heard in the criminal trial.

29. The majority of the Court of Appeal adopted a somewhat extended version of issue estoppel and, on that basis, ordered that the statements of claim should be struck out: [1980] QB 283. Goff LJ concurred in making the order, but did so on the ground of abuse of process. Agreeing with Goff LJ, the House of Lords dismissed Hunter's appeal on the basis that the statements of claim should be struck out since initiating the civil action constituted an abuse of process. The House of Lords also adopted Goff LJ's reasons for rejecting the new evidence, partly on the ground that it could have been led at the trial but also because it was not such as "entirely changes the aspect of the case": *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, 814. Lord Diplock, with whom all the members of the appellate committee agreed, considered that this "rigorous" test was appropriate in the case of a collateral attack in a court of co-ordinate jurisdiction: [1982] AC 529, 545.

30. Lord Diplock described the abuse of process involved in the civil proceedings in *Hunter* in this way, at pp 541-543:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of

mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

The proper method of attacking the decision by Bridge J in the murder trial that Hunter was not assaulted by the police before his oral confession was obtained would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous a ground of his appeal against his conviction to the Criminal Division of the Court of Appeal. This Hunter did not do. Had he or any of his fellow murderers done so, application could have been made on that appeal to tender to the court as 'fresh evidence' all material upon which Hunter would now seek to rely in his civil action against the police for damages for assault, if it were allowed to continue. But since, quite apart from the tenuous character of such evidence, it is not now seriously disputed that it was available to the defendants at the time of the murder trial itself and could have been adduced then had those who were acting for him or any of the other Birmingham Bombers at the trial thought that to do so would help their case, any application for its admission on the appeal to the Court of Appeal (Criminal Division) would have been doomed to failure.

It would call for a degree of credulity too extreme to be expected even from judicial members of your Lordships' House to fail to recognise that the dominant purpose of this action, and the parallel actions brought by the other Birmingham Bombers so far as they are brought against the police, has not been to recover damages but is brought in an endeavour to establish, long after the event when memories have faded and witnesses other than the Birmingham Bombers themselves may be difficult to trace, that the confessions on the evidence on which they were convicted were induced by police violence, with a view to putting pressure on the Home Secretary to release them from the life sentences that they are otherwise likely to continue to serve for many years to come. A significant indication that the recovery of monetary damages is not the principal object of the civil action may be discerned in the manner in which the action has been conducted as against the Home Office. Despite the fact that ever since August 1979, when the Home Office amended their defence by admitting liability for assaults by the prison officers, Hunter has been in a position to obtain judgment against the Home Office on liability and proceed to an assessment of damages, no step has yet been taken on his behalf to do so.

My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not

surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A L Smith LJ in *Stephenson v Garnett* [1898] 1 QB 677, 680-681 and the speech of Lord Halsbury LC in *Reichel v Magrath* (1889) 14 App Cas 665, 668 which are cited by Goff LJ in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A L Smith LJ:

> '... the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court.'

The passage from Lord Halsbury's speech deserves repetition here in full:

> '... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.' . . .

My Lords, this is the first case to be reported in which the final decision against which it is sought to initiate a collateral attack by means of a civil action has been a final decision reached by a court of criminal jurisdiction. This raises a possible complication that the onus of proof of facts that lies upon the prosecution in criminal proceedings is higher than that required of parties to civil proceedings who seek in those proceedings to prove facts on which they rely. Thus a decision in a criminal case upon a particular question *in favour* of a defendant, whether by way of acquittal or a ruling on a voir dire, is not inconsistent with the fact that the decision would have been *against* him if all that were required were the civil standard of proof on the balance of probabilities. This is why acquittals were not made admissible in evidence in civil actions by the Civil Evidence Act 1968. In contrast to this a decision on a particular question *against* a defendant in a criminal case, such as Bridge J's ruling on the voir dire in the murder trial, is reached upon the higher criminal standard of proof beyond all reasonable doubt and is wholly inconsistent with any possibility that the decision would *not* have been *against* him if the same question had fallen to be decided in civil proceedings instead of criminal. That is why convictions were made admissible in evidence in civil proceedings by the Act of 1968."

31. In the Board's view Mr Hurnam's initiation of the present action is comparable to the plaintiff's initiation of the action in *Hunter*. In that case Lord Diplock drew attention to aspects of the proceedings which indicated that the real purpose of the various plaintiffs in raising and prosecuting the proceedings was not to obtain damages but to try to establish that their confessions had been induced by police violence – with a view to putting pressure on the Home Office. The same applies here. The two defendants, Kailash and Soobash, are not men of means and so Mr Hurnam could have no hope, if he were successful in this action, of actually obtaining any sum by way of damages from them. The fact that he has no real interest in any award of damages is indeed demonstrated by the fact, to which their Lordships referred at para 3 above, that he restricted the sum sought as damages to one per cent of the amount which he alleges his claim is actually worth. Mr Hurnam's real aim in bringing the action is not to obtain damages. Rather, bringing the action is one of the ways in which he has tried, or is trying, to rehabilitate his reputation – another being his attempts, before the Board in *Director of Public Prosecutions of Mauritius v Hurnam* [2007] 1 WLR 1582, and subsequently in the Supreme Court, to reopen the criminal proceedings. His aim in these proceedings is quite simply to obtain a decision of the civil court, as to what happened between himself and Soobash and Kailash, which is inconsistent with the decision of the (criminal) Intermediate Court - affirmed on appeal by both the Supreme Court and this Board - that he was guilty of conspiring to fabricate an alibi for Soobash. In particular, he wishes to use civil proceedings, in which findings are made on the balance of probabilities, to call into question the guilty verdict which the Intermediate Court returned after applying the criminal standard and finding that he was guilty beyond reasonable doubt. Such a result might well be of use to him if, as he mentioned in the course of submissions, he were to try to obtain a Presidential pardon under section 75(1) of the Constitution.

32. Mr Hurnam drew attention to the fact that the praecipe contains averments (set out at para 17 above) relating to Kailash's allegation that he (Mr Hurnam) had received Rs 25,000 from Kailash, knowing that they were the proceeds of crime. That allegation had formed the basis of Count I on the information against him, dated 31 October 2001. But, in the event, on 1 April 2002 the prosecution decided not to proceed with that count and Kailash did not give evidence at Mr Hurnam's trial. It followed, said Mr Hurnam, that the scope of the allegations in the averments in the present action is wider than the scope of the allegations in the criminal proceedings against him. So the present proceedings could not be regarded as simply constituting an attempted collateral attack on the decision in the criminal proceedings against him.

33. Their Lordships acknowledge that Mr Hurnam's argument would have force if the averments relating to Kailash's allegation about his accepting Rs 25,000 were a severable and indeed separate matter. But, as can be seen from the Board's narrative at paras 16-18 above, the truth is that in Mr Hurnam's averments the allegation about what Kailash said to the police in this respect is bound up with

the allegation that Kailash lied to the police about the fitness centre alibi. It is indeed unrealistic to imagine that Mr Hurnam has any substantial separate interest in establishing the averments relating to his alleged receipt of Rs 25,000. They are simply an integral part of his attempt in this action to show that his conviction for conspiring to fabricate the fitness centre alibi was wrongful. As such, they are an integral part of what their Lordships can only regard as a clear abuse of process.

34. The abuse of process is particularly well illustrated by Mr Hurnam's attempt to rely on the evidence relating to what Soobash said to Mr Lowtoo in the prison cell (see para 21 above). Assuming that this is fresh evidence, the appropriate step would have been for Mr Hurnam to place it before the Supreme Court, in the same way as he put the statements of Soobash dated 10 and 20 March 2007 before that court, and to invite the court on that basis to direct the reopening of the criminal proceedings against him. In other words, if Mr Lowtoo's evidence is really a basis for saying that his conviction was wrongful, then Mr Hurnam should put it before the Supreme Court in a procedure which would allow the court to consider the evidence and either set aside or confirm his conviction, depending on its view of the significance of the evidence. Instead, Mr Hurnam seeks to use it in these proceedings where the conviction cannot be reviewed but where, he hopes, he may achieve a result which will – indirectly – undermine faith in his conviction. That is an utterly impermissible tactic.

35. In the course of his submissions Mr Hurnam referred to the two statements by Soobash. For the reasons given by the Supreme Court in their judgment dated 18 May 2007, setting aside Mr Hurnam's application for an order directing the re-opening of the criminal case against him, the Board does not consider that these statements are of significance. See para 10 above. Mr Hurnam laid more emphasis on what he said was the significance of Mr Lowtoo's evidence, which had never been considered by the Board. Their Lordships would merely observe, however, that they could not possibly regard that evidence as something that "entirely changes the aspect of the case": *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, 814, per Earl Cairns LC. It would not therefore pass the "rigorous" test which Lord Diplock regarded as appropriate for fresh evidence introduced for the purpose of mounting a collateral attack in a court of co-ordinate jurisdiction: *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 545.

36. Their Lordships make two additional observations.

37. First, the submissions which the Board heard related entirely to the approach to abuse of process laid down by the House of Lords in the *Hunter* case. Mr Hurnam did not argue that the law in Mauritius was different. Nevertheless, their Lordships would have been concerned if it had appeared that the approach would have been out of line with any relevant doctrine which might have been

derived from French law. Happily, there is no risk of that. In effect, French law would go further and give decisive authority in civil proceedings to a prior decision of the criminal court in relation to the same matter, irrespective of whether it was a conviction or an acquittal.

38. An authoritative description of the position in France is to be found in the report, "La vérité de la chose jugée" by M Jean-Pierre Dintilhac, the President of the second civil chamber of the Cour de Cassation (2005). As he explains, the fundamental principle in French law is that the decision of a criminal court on a matter of fact prevails in civil proceedings relating to the same matter ("la vérité de la chose jugée au pénal sur le civil"). The principle is not to be found in any provision of any code. But it lies at the root of the rule, now to be found in the second paragraph of article 4 of the Criminal Procedure Code, that a civil judge has to await the outcome of any criminal proceedings which have been begun in relation to the same matter.

39. The underlying principle was identified by the chambre civile of the Cour de cassation in the arrêt *Quertier*, 7 mars 1855, D 1855.1.81; S 1855.1.439. Having referred to the equivalent of article 4 then in force, the court said:

> "Attendu que la disposition du Code d'instruction criminelle qui suspend l'exercice de l'action civile devant le juge civil, tant qu'il n'a pas été prononcé définitivement sur l'action publique, attribue ainsi à l'action publique un caractère essentiellement préjudiciel; que, dès lors, le jugement intervenu sur cette action, même en l'absence de la partie privée, a nécessairement envers et contre tous l'autorité de la chose jugée quand il affirme ou nie clairement l'existence du fait qui est la base commune de l'une et de l'autre action, ou la participation du prévenu à ce fait…; Que, lorsque la justice répressive a prononcé, il ne saurait être permis au juge civil de méconnaître l'autorité de ses souveraines déclarations ou de n'en faire aucun compte; que l'ordre social aurait à souffrir d'un antagonisme qui, en vue seulement d'un intérêt privé, aurait pour résultat d'ébranler la foi due aux arrêts de la justice criminelle, et de remettre en question l'innocence du condamné qu' elle aurait reconnu coupable, ou la responsabilité du prévenu qu'elle aurait déclaré n'être pas l'auteur du fait imputé…."

40. There is, however, no need to investigate the matter in any more detail since it has been held that this particular principle does not form part of the law of Mauritius. In *Gorpatur v Kooshur* 1951 MR 31 the Supreme Court (Espitalier-Noel Ag CJ, Brouard and Neerunjun Ag JJ) noted that the Code d'Instruction Criminelle, which was under discussion in *Quertier*, had been repealed in

Mauritius by Ordinance No 29 of 1853. The court concluded that, in the absence of any text allowing it to apply the ratio decidendi of the French courts on the matter, the French rule should not be followed in Mauritius.

41. This leads on to the second point. In England at common law a conviction in a criminal court was of no evidential value in civil proceedings relating to the same matter: *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. In *Gorpatur v Kooshur* 1951 MR 31, having rejected the French rule, the Supreme Court held that the English law on this point applied in Mauritius. The law in England was amended by the Civil Evidence Act 1968 so that, by section 11, a conviction is now prima facie evidence that the person convicted did commit the offence of which he was found guilty. No equivalent amendment has been made in Mauritius. So the position remains that, in the present proceedings, for example, the defendants could not introduce evidence of Mr Hurnam's conviction as evidence that he had committed the offence of which he was convicted. That would be of some possible relevance in legitimate proceedings brought by Mr Hurnam against Kailash and Soobash. Here, however, except in relation to the two later statements of Soobash and the evidence of Mr Lowtoo, the issue raised by the State has nothing to do with the availability or admissibility of evidence in relation to the events in question. On the contrary, the contention is quite different: that the Board's duty is to strike out the action because its purpose is illegitimate and it constitutes an abuse of process. The rule in *Hollington v F Hewthorn & Co Ltd* does not affect that contention.

42. For the foregoing reasons their Lordships are satisfied that Mr Hurnam's initiation and prosecution of the present action constitutes an abuse of process. They must accordingly order that the action should be struck out. The appellant and the intervener should make submissions in writing on costs within 28 days.

LORD BROWN

43. I am in full agreement with the Board's conclusion that this action must be struck out as an abuse of process. Its whole purpose is illegitimate. As the Board's reasoning surely demonstrates, the self-evident purpose of the action is to seek to undermine confidence in the appellant's criminal conviction, principally based as that was on the evidence of Soobash, the attack on whose evidence given at the trial is central to the present proceedings. *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 clearly establishes that such collateral attack is not permissible.

44. Whilst I have no doubt that that in itself is an ample basis on which to strike out this action as an abuse of process, it seems to me important not to overlook a

distinct further basis upon which this action, certainly as against Soobash, must plainly be regarded as abusive and not allowed to continue. This further fact is that the action flies flagrantly and directly in the face of the absolute witness immunity which the law accords to Soobash in respect of the evidence he gave at the appellant's trial. That such immunity exists and that it extends to any preliminary questioning of, and statements made by, the witness is well established – see, for example, the speeches in the House of Lords in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 and the many authorities there referred to. The reason for such witness privilege is plain. As Lord Hoffmann put it in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, 208, the absolute immunity rule:

> "is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say."

45. This aspect of the present action to my mind serves to make this a yet plainer case for striking out the claim than *Hunter* itself. In *Hunter* no question of witness immunity arose: the link between the claim – a claim for damages for personal injuries caused by assault – and the claimants' convictions was altogether less direct: the claimants were hoping to establish that their confessions had been induced by police violence and so should not have been adduced or relied upon against them. Here the collateral challenge is direct and patent. Plainly it cannot be permitted. To allow it to proceed would be to imperil the future administration of justice.