**CHARLES ROGER RICHARDSON V LYNDON D. RAYNOR (POLICE SERGEANT)**

REGION

**Bermuda, North Atlantic Ocean**

MODE OF EXPRESSION

**Electronic/Internet-based Communication**

DATE OF DECISION

**August 12, 2011**

OUTCOME

**Decision - Application Granted, Declaratory Relief, Violation of a Rule of International Law established and Law upheld.**

CASE NUMBER

**[2011] SC (**BDA**) 39 CIV**

JUDICIAL BODY

**Supreme Court**

TYPE OF LAW

**Constitutional Law/International Law**

THEMES

**Defamation/Reputation**

TAGS

**Freedom of Expression, Non-intentional Defamation, Facebook**

**CASE ANALYSIS**

**Case Summary and Outcome**

The Supreme Court of Bermuda sitting at Hamilton held that the prosecution of the Applicant for unlawful defamation contravenes his right to freedom of expression. The Applicant in this suit is a prominent criminal defence lawyer of African-Bermudian descent, he was charged in relation to a Facebook posting suggesting that a Police Inspector involved in his prosecution for a previous minor criminal offence, and for which the Applicant was conditionally discharged by the Magistrates’ Court, might be a racist. The Applicant was charged with the offence of defamatory remarks and the Applicant’s counsel seeks the court for an interpretation of the Part XII of the Criminal Code whether it contravenes the Applicant’s right under Section 9(1) of the constitution. The Learned Senior Magistrate referred the matter to this Court pursuant to the provisions of Section 15 (1)-(3) of the Constitution, which provide as follows:

“ 15 (1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress. (2) The Supreme Court shall have original jurisdiction— (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled”

The Respondent is the Police Inspector against whom the acclaimed defamatory statements were made. The court held in particular that the Applicant is entitled to a declaration that his prosecution for unlawful defamation contravenes his right to freedom of expression and that the categorization of negligent libel as a criminal offence contravenes provision of Section 9 of the Constitution of Bermuda and ordered a modification of the contravening Section 214 (I) of the Criminal Code.

**Facts**

The Applicant who is a member of the Bar in Bermuda and also an African-Bermuda citizen was charged under section 214 (1) of the Criminal Code upon an Information which alleged as follows:

*“1. On the 11th day of May 2010, in the Islands of Bermuda, did unlawfully publish defamatory matter concerning Police Inspector [C], to wit: ‘This Detective Inspector really has it in for me! Why on earth [C] has taken an unhealthy interest in me is astonishing...I really hope it ain’t because I’m good at what I do and I’m black...that would make him vindictive and racist...could it be?”*

The Applicant had earlier been conditionally discharged for possession of a small quantity of cannabis found in his residence following the execution of the Respondent’s search warrant on August 11, 2009. He was initially charged in Magistrates’ Court on or about March 31, 2010, and discharged on the same date. On or about May 11, 2010, he appeared in Court to seek a modification of the terms of his conditional discharge. The Police Inspector who led the search of his residence attended Court on both occasions. On the date of the second Court appearance, the Applicant posted the offending remarks about the Police Inspector on his Facebook page.

Mr. Attridge, counsel for the Applicant, criticized the preferential treatment afforded to newspaper periodicals by section 222 which provides that no criminal prosecution for defamation may be commenced against any person responsible for a periodical without leave of a judge and a hearing at which the accused person has an opportunity to be heard. Mr. Attridge also placed the May 16, 2011 **United Nations General Assembly ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’** before the Court. The Report focuses on the importance of freedom of expression in the internet era and the limited circumstance in which States can permissibly interfere with such expression in compliance with article 19 of the International Covenant on Civil and Political Rights (ICCPR).

Ms. Heather Rogers Q.C.’s ‘Written Submissions on Behalf of the Media Legal Defence Initiative’ approaches the issue of the constitutional validity of Bermuda’s criminal defamation provisions in the following way. Her primary submission is that all forms of criminal defamation are unacceptable while her secondary contention is that if defamation is to continue to be criminalized, criminal sanctions ought only to be available in cases which are serious or where the harm caused is substantial (and never for slander).

She further noted that on October 4, 2007, the **European Union Parliamentary Assembly** by recommendation 1814 called upon the Committee of Ministers “*to urge all member states to review their defamation laws and, where necessary make amendments in order to bring them into line with the case law of the European Court of Human Rights, with a view to removing any risk of abuse or unjustified prosecutions.”*

Ms Rogers also referred to what appears to be a trend towards decriminalising defamation altogether, pointing out that no such penalties exist in Bosnia & Herzegovina, Ghana, Georgia, New Zealand, Scotland, Sri Lanka, Ukraine and the United States (in term of Federal law), while Ireland and the United Kingdom (in respect of England & Wales) both recently abolished criminal defamation in 2009. Ms. Rogers also drew to the Court’s attention to the House of Lords decision in **Gleaves-v-Deakin [1980] A.C. 477.** Where Lord Diplock opined that the consent of the Attorney-General should be a prerequisite for any prosecution;

*“the Attorney General could then consider whether the prosecution was necessary on any of the grounds specified in article 10.2 of the Convention and unless satisfied that it was, he should refuse his consent” (at page 484B-C). “*

Lord Diplock also stated that the effect of the onus being placed on a defendant charged with criminal defamation to prove that the impugned statements were for the public benefit was to “*turn article 10 of the Convention on its head*” (page 483D-F).

Ms. Rogers submitted that section 214 of the Criminal Code was inconsistent with section 9 of the Bermuda Constitution because it did not require the prosecutor to prove (1) seriousness, (2) necessity and proportionality, and (3) that the public interest required the bringing of proceedings. **Raichinov-v-Bulgaria (2008) 46 EHRR 28., Cumpǎnǎ and Mazǎre v. Romania [GC], no. 33348/96, § 115, ECHR 2004-XI**, **Gavrilovici-v-Moldova application 25464/05 (15 December 2009)**.

The Applicant’s counsel adopts the entirety of the Amicus brief submitted by the Media Legal Defence Initiative (“MLDI”), which contends that section 214 as a whole should be found to be unconstitutional, and focuses on whether the application of section 214(1) of the Code taken in its statutory context to the Applicant on the facts of the present case contravene his rights under section 9 of the Constitution.” In support of this position; Counsel cited two cases. **Worme-v- Commissioner of Police for Grenada [2004] 2 A.C. 430.** Where it was submitted that nonintentional defamation was quite different. **The Royal Gazette et al-v- Attorney General and The Commissioner of Police, Supreme Court, Civil Jurisdiction 1982**: 177, (Judgment dated August 27, 1982,) noting that an attempted prosecution for intentional defamation was held to be unconstitutional.

Applicant’s counsel finally concluded by stating “**We submit that the crime of negligent libel has no place in a modern democracy...”**

The Respondent in defending the argument, stated in his Witness Statement that the Applicant published the defamatory statements on his Facebook page the security settings of which were such that only his friends could read them. A Detective Sergeant who could not read the statements called a Police Constable who was one of the Applicant’s Facebook friends at around 4.30 pm and asked her to access the comments and to forward them to him. The Detective Sergeant upon receipt forwarded the Applicant’s comments and related comments from the Applicant’s Facebook friends on to the Police Inspector.

The Respondent did file two Witness Statements. One essentially exhibited the Facebook extracts containing the offending remarks and comments while the other was the Police Inspector’s largely subjective account of how the original statement and the related comments distressed him. Most significantly however, the Respondent stated that his employers saw fit to carry out a security assessment on his behalf. These steps were quite clearly prompted by one of the responses to the Applicant’s remarks, not his remarks themselves; however, the Police Inspector quite fairly took the view that the threatening comments were instigated by the original remarks, coming as they did from a person with “many ‘Facebook’ fans”.

Further, in the Witness Statement, it was accounted that some of the Applicant’s Facebook friends responded in a way that caused the Inspector himself to subjectively fear for his safety. One of the comments that the Inspector was most troubled the Respondent said: “*He is racist. Met up with him a few years ago…Needs to get his a\*\* outta Bermuda…b\*st\*rd”.* The Respondent however, conceded that the mere application of the criminal law of defamation to the Applicant’s case impermissibly interferes with his constitutional rights, while disputing that section 214(1) is inconsistent on its face with section 9(1) of the Constitution.

The Submissions made by the Crown was to oppose the grant of a declaration that section 214(1) is unconstitutional on its face but remarkably no authority was cited in support of the bare submissions that “given the fact that the imposition of criminal liability in the ‘intentional’ category of case cannot infringe on principles of free speech; then the extension of the offence to include ‘negligent’ libel similarly does not encroach on the principles of free speech”. The Respondent concluded and indeed hinged its position on what it believed to be the best defence of the constitutionality of section 214(2) of the Code (intentional defamation), not section 214(1) in the following words:

*“The removal or absence of criminal sanctions in respect of a particular type of conduct signifies that it is acceptable conduct. The law should not send out such a message in respect of matter which is published reckless of its defamatory and false character, which can only be designed to injure the victim.”*

The Submissions of the Attorney-General started by pointing out that the Applicant’s characterization of the offence created by section 214(1) as “negligent libel” is misconceived.

Accordingly, the Acting Solicitor-General also contends that the elements of the two section 214 offences are not necessarily clearly distinguishable based on the requirement of knowledge of falsity alone, as superficially seems to be the case. As was submitted by the counsel,

In addition, however, it was argued that the offence under section 214(1) necessarily required proof of an intention to defame as part of the *mens rea* of the offence. Reliance was placed on **Lucas-v- R [1998] 3 LRC 236** (a Supreme Court of Canada case) and the **Tonga Court of Appeal case of R-v- Pohvia [2010] 1 LRC 763**. The Attorney-General’s reliance on the cases of **Worme -v- The Commissioner of Police [2004] UKPC 8 (at paragraphs 42 to 43) and Lucas-v- R [1998] 3 LRC 236 (at paragraphs 31-83, 88-97)** was clearly premised on the assumption that all charges under section 214(1) require proof of an intention to defame.

The Application in this suit was heard and judgment was delivered on August 12,2011.

**Decision Overview**

Justice Kawaley delivered the judgment of the Supreme Court of State of Bermuda in this case. The issues for determination are:

1. whether section 214(1) of the Criminal Code Act 1907 (‘the Code’) taken in its statutory context on its face contravenes section 9 of the Constitution; and
2. whether the application of section 214(1) of the Code taken in its statutory context to the Applicant on the facts of the present case contravene his rights under section 9 of the Constitution.”

In addressing the first issue; it was queried whether the application of section 214(1) of the Criminal Code to the Applicant on the facts of the present case interferes with his right to freedom of expression under section 9 (1) of the Constitution. The fundamental right protected by section 9(1)” the Court states that:

*“(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*

*(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*

*(a) that is reasonably required— (i) in the interests of defence, public safety, public order, public morality or public health; or (ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or*

*(b) that imposes restrictions upon public officers or teachers, except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*

Reacting to the provision of the law, Kawaley, J noted that Section 9(1), in very broad terms, proclaims and protects “freedom of expression”, which is non-exhaustively defined as including “*freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence*”. Section 9(2) then proceeds to demarcate the extent to which this fundamental right may be lawfully restricted by anything either (a) contained in any law, or (b) done under the authority of any law. It is the latter form of restriction, the effect of the application of the provisions of section 214(1), which is of present concern. However, irrespective of what form of restriction of freedom of expression is in issue, the law on its face or the law in action, the restriction can only validly interfere with the fundamental rights protected by subsection (1) of section 9 if the law is reasonably required for one of the section 9(2) purposes. Even if the interference is “reasonably required” for a qualifying purpose, the interference with freedom of expression may still be impermissible if it is “*shown not to be reasonably justifiable in a democratic society*”.

Kawaley J in addressing the basis for which the Applicant was charged bearing in mind the fact that the Applicant was simply writing to his Facebook friends expressing a personal gripe, it is difficult to see what public harm was caused by his remarks. The court noted that:

*The laying of a criminal charge, in and of itself, unarguably interfered with his section 9(1) rights. For a practicing lawyer to be charged with a criminal offence for expressing opinions about the motivation of the Police in charging him with another minor criminal offence for which he had been discharged by a Court must constitute one of the more dramatic forms that public interference with section 9(1) rights could potentially take in a democratic society. But equally, the officer cast as the villain of the piece might retort, it is difficult to imagine a practising lawyer expressing in writing (otherwise than in support of a client’s cause) more pejorative remarks about a senior police officer. Be that as it may, the crucial question is whether (the Respondent having conceded this point and the Attorney-General adopting an essentially neutral position), the material before the Court establishes any reasonable requirement which justifies the prima facie interference with his section 9(1) rights which the Applicant has made out”*

The court further noted that:

*(a) “Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’ ”; (b) “As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly”; (c) “The adjective ‘necessary’, within the meaning of Article 10 § 2, implies the existence of a ‘pressing social need’”; (d) “In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’”; (e) “It is true that he did not lay himself open to public scrutiny and needed to enjoy confidence in conditions free of undue perturbation when on duty.* ***Steur v. the Netherlands, no. 39657/98, §§ 40 and 41, ECHR 2003-XI”***

In considering in more detail the arguments advanced by counsel for both parties in their helpful submissions, their Lordships bear in mind the importance that is attached to the right of freedom of expression, particularly in relation to public and political matters, guaranteed by section 10 of the Constitution by stating thus:

*The spirit of the statement of the European Court of Human Rights in* ***Lingens v Austria (1986) 8 EHRR 407, 418-419, at para 42,*** *that “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention” has been reflected in decisions of courts throughout the world. In* ***Hector v Attorney General of Antigua [1990] 2 AC 312, 318,*** *for instance, Lord Bridge of Harwich said: ‘In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.’”*

*Secondly, the criminal complainant in the present case was a senior police officer whom, while not as senior a public officer as the complainant in Raichinov, may be presumed to enjoy a measure of security of tenure so that the defamatory remarks are unlikely to impact adversely on his ability to perform his public duties. It is, surely, an occupational hazard of being a police officer or a judge that one’s official actions will on occasion generate critical comment of a pejorative nature, both from persons adversely affected by such actions and (when the matters concerned are in the public domain) members of the wider public. This leads on to the third point.*

*Thirdly, and pivotally, I accept the European Court of Human Rights’ holding that “the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’”. The Applicant’s impugned remarks were made in the private context of informal communication and, from its timing, was clearly an impromptu emotional response to what must have been an extremely uncomfortable experience (for a criminal defence lawyer) of appearing in court as a criminal defendant. The Applicant merely asked the rhetorical question of whether racism on the part of the Police Inspector had prompted the search of the Applicant’s home and the decision to charge him with possessing a small amount of cannabis, based on the positive assertion that the Inspector really “had it in for” the Applicant.*

The court further noted that:

*Although a more appropriate question might, perhaps, not have focused on the Police Inspector at all but rather on the broader policy implications of how the discretion to prosecute is exercised in relation to such offences, the Applicant’s comments also tapped into a wider longstanding public policy debate. Against a history of slavery and segregation and widely canvassed public concerns about the over-representation of African-Bermudian males in the criminal justice system, the impugned comments might be viewed as somewhat inelegantly inviting debate on whether the Applicant’s racial profile may have influenced the decision to prosecute him. The operative decision to exercise the discretion to prosecute was made by the Director of Public Prosecutions, not the Police Inspector. But even if the Applicant’s comments were unfair (as they appear to me to be) and the innuendo about the Inspector wholly wrong (as it appears based on the evidence before me to be), it is difficult to see how this would justify the first criminal defamation charge in Bermuda for almost 30 years.*

The court remarkably noted that in addressing the Skeletal Submissions of the Attorney General’s Chambers, it is submitted that the crucial issue is “*whether there has been a real threat to the Detective Inspector’s reputation by the alleged defamatory material*”. Merely establishing such a threat cannot suffice to justify criminal defamation proceedings within the reasonable requirements of section 9(2) of the Constitution. Indeed, as the European Court of Human Rights has pointed out in **Gavrilovici-v-Moldova, Application 25264/05**, the mere use of insulting terms which are often matters of opinion rather than assertions of fact are not necessarily defamatory. See also, **Scharsach and News Verlagsgesellschaft v. Austria, no. 39394/98, § 43, ECHR 2003-XI). In Bodrožić v. Serbia (no. 32550/05, § 51, 23 June 2007)**, the Court repeated its view that the generally offensive expressions ‘idiot’ and ‘fascist’ may be considered to be acceptable criticism in certain circumstances **Bodrožić, cited above; Oberschlick v. Austria (no. 2), judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV; Feldek v. Slovakia, no. 29032/95, ECHR 2001-VIII)**.

The court explains the impact of the existing law Section 214 of the Criminal Code to determine if it has an overriding power over the Section 9 of the Constitution as well as decoding the interpretation of Section line by examining Article 10 of ECHR from which the Section 9 was drawn from.

*“Article 10*

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2.The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

The court observed that Section 214(1) on its face and read in its statutory context presently permits a charge of criminal defamation to be laid in respect of non-intentional (and even non-negligent) defamation in circumstances where the statement is not made on a protected occasion. The court emphasized that the only mental element of the offence as found in Section 214 of the Criminal Code is that it has to be proved that the accused intended to publish the material in question. The court cited the decision in support of the view in the Tongan Court of Appeal (Burchett, Salmon and Moore JJ) decision **in** **R-v-Pohiva [2010] 1 LRC 763 at paragraphs [12]-[13]. 70 in .** In such cases the Crown need not prove aggravating elements such as ill-will or an absence of good faith (including an intention to defame). Moreover, the narrow scope of the criminal defence of justification under section 212 of the Code would mean that a person could potentially be charged in circumstances where the defamatory statement was true but not made for the public benefit.

The court noted that the only apparent justification for section 214 is “protecting the…reputations…of other persons”. This Court is bound to approach the question of whether the provisions of section 214(1) of the Criminal Code impermissibly interfere with freedom of expression applying the following test applied by the Judicial Committee of the Privy Council in **Worme and another-v-The Commissioner of Police [2004] UKPC 8**. The court considered the test of “proportionality” of the provision of Section 214 (I) of the Criminal Code as a restriction on Freedom of Expression where just the decision in **de Freitas v Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80** adopted the analysis of **Gubbay CJ in Nyambirai v National Social Security Authority [1996] 1 LRC 64, 75** for determining whether a limitation on freedom of expression is arbitrary or excessive: ‘whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.’”

Delivering his judgment, Kawaley J clearly expressed the emphatic opinion of the court that criminalizing defamatory expression which is so trivial that it encompasses only (a) statements not intended to injure and/or not known to be false, and (b) conduct so lacking in severity that it can only be tried summarily, goes beyond the confines of what is reasonably required to prevent reputational damage to individual citizens and/or public officials, bearing in mind the existence of alternative civil relief. Judge Kawaley notably observed that neither the Respondent nor the Attorney-General advanced any convincing case for section 214(1) to be given such an extensive reach in terms of restricting the freedom of expression rights guaranteed by section 9(1) of the Constitution in their briefs and the hearing of the case.To the mind of the court as expressed by Judge Kawaley *“the scope of impairment of free speech is aggravated by the fact that truth, in the absence of a public interest in publication, is not a defence to a criminal defamation charge as it is in the context of a civil defamation claim. Moreover, either party to a civil defamation suit has the right under Order 33 rule 2 to apply for trial by jury. If the Prosecution (or a private prosecutor) elects to lay a charge under section 214(1) of the Criminal Code, it can only be tried summarily”* Noting that the provision of Section 9 of the Bermuda Constitution was drawn from provision of Article 10 of ECHR the court found it apt to cite with approval the observations of Lord Diplock *in* ***Gleaves –v-Deakin et al [1980] 1 A.C. 477******at 483F*** that the equivalent English position was inconsistent with article 10 of ECHR are correct, this constitutes a further way in which section 214(1) on its face impermissibly restrains freedom of expression under Bermudian law that.

*“The examination of the legal characteristics of the criminal offence of defamatory libel as it survives today, which has been rendered necessary in order to dispose of this appeal, has left me with the conviction that this particular offence has retained anomalies which involve serious departures from accepted principles upon which the modern law of England is based and are difficult to reconcile with international obligations which this country has undertaken by becoming a party to the European Convention on Human Rights and Fundamental Freedoms (1953)…”*

Consequently the Supreme Court believed that, section 214(1) is inconsistent with section 9(2) of the Constitution and unreasonably interferes with the freedom of expression rights protected by section 9(1) in the following three key respects.***Firstly, it permits prosecutions for defamation sufficiently trivial to warrant categorization as a summary offence. Secondly, it permits prosecutions for non-intentional defamation. Thirdly, there is no adequate mechanism to ensure that private prosecutions are only commenced in circumstances which appear to the public prosecuting authorities to be reasonably required within section 9(2).***

Beyond this finding, the apex court considered the need to bring Section 214 (I) of the Criminal Code conformity with the Constitution, as required by section 5(1) of the Bermuda Constitution Order, which (it bears repeating), provides as follows:

*“5 (1) Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.”*

The Supreme Court admirably expressed its view on what should be the appropriate wording of Section 214 (I) to be an “existing law” under Section 5 of the Constitution of Bermuda. Judge Kawaley expressing the mind of the court stated that:

*“For the above reasons, I find that the provisions of section 214 (1) should be modified so as to bring them into conformity with section 9 of the Constitution, subject to hearing counsel on the precise terms of the order to be drawn up to give effect to the present Judgment. The intended effect of the modifications is to read out of section 214 the existing summary only and indictable only offences altogether, and to adapt the section by creating a single offence which is triable either summarily or on indictment which offence requires proof that the defendant knew the defamatory statement was false. In addition, the section is modified so as to require that no prosecution can be commenced without the written consent of the Director of Public Prosecutions, the implicit understanding being that he will satisfy himself that the facts of the case fall within section 9(2) of the Constitution”*

The Supreme Court went further to order a modification to Section 214 (I) of the Criminal Code and stated clearly that *“the section would now read as follows:*

***“Unlawfully publishing defamatory matter 214 Any person who unlawfully publishes any defamatory matter concerning another person knowing the defamatory matter to be false is guilty of an offence, and is liable to imprisonment for twelve months upon summary conviction and on conviction on indictment to imprisonment for two years,***

***Provided that no charge shall be laid under this section without the consent expressed in writing of the Director of Public Prosecutions.”***

Finally, the Court held that the Applicant is entitled to a declaration that his prosecution for unlawful defamation (in relation to a Facebook posting suggesting that a Police Inspector involved in his prosecution for a previous minor criminal offence, and for which the Applicant was conditionally discharged by the Magistrates’ Court, might be a racist) contravened his rights of freedom of expression in contravention of section 9 of the Bermuda Constitution. The Applicant is further entitled to a declaration that section 214(1) of the Criminal Code is on its face invalid for contravening section 9 of the Bermuda Constitution. The court further ordered a modification to Section 214 (I) to include written consent of Director of Public Prosecutions for a person to be tried under it and for inclusion of “knowledge of falsity” of the defamatory matter in the two circumstances under section 214(I) of the Criminal Code.

**DECISION DIRECTION**

This decision expands Freedom of Expression as it found that the prosecution of the Applicant for unlawful defamation under the existing Criminal Code contravenes his freedom of expression as protected by Section 9 of the constitution of Bermuda and ended with a declaration of invalidity for the said Section 214 (I) of the Criminal Code. Section 214 (I) of the Criminal Code indeed contravenes right to Freedom of Expression as protected by Section 9 of the Constitution for restricting freedom of expression in relation to conduct sufficiently trivial so as to be categorized as a summary offence and essentially criminalizing non-intentional defamation. The ordered modification of Section 214 (I) of the Criminal Code to include “knowledge of falsity” of the defamatory matter in the two circumstances under the section is quite commendable and greatly expands expression.

**GLOBAL PERSPECTIVE**

**Related International and/or Regional Laws**

European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), Article 10

United Nations General Assembly ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’

**National Standards, Laws or Jurisprudence**

Constitution of Bermuda Order, Section 9(1) (2) (a) (b), 21, 300A

Criminal Code, Section 214(1), 1907

Bermuda, Bodrožić v. Serbia (no. 32550/05, § 51, 23 June 2007)

Bermuda, de Freitas v Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80

Bermuda, Feldek v. Slovakia, no. 29032/95, ECHR 2001-VIII).

Bermuda, Gavrilovici-v-Moldova, Application 25264/05

Bermuda, Gleaves –v-Deakin et al [1980] 1 A.C. 477 at 483F

Bermuda, Gubbay CJ in Nyambirai v National Social Security Authority [1996] 1 LRC 64, 75

Bermuda, Hector v Attorney General of Antigua [1990] 2 AC 312, 318,

Bermuda, Lingens v Austria (1986) 8 EHRR 407, 418-419, at para 42,

Bermuda, Oberschlick v. Austria (no. 2), judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV;

Bermuda, Scharsach and News Verlagsgesellschaft v. Austria, no. 39394/98, § 43, ECHR 2003-XI).

Bermuda, Steur v. the Netherlands, no. 39657/98, §§ 40 and 41, ECHR 2003-XI.

Bermuda, Worme and another-v-The Commissioner of Police [2004] UKPC 8:

Bermuda,The Royal Gazette et al-v- Attorney General and The Commissioner of Police, Supreme Court, Civil Jurisdiction 1982, 177

Canada, Lucas-v- R [1998] 3 LRC 236

Tonga, R-v-Pohiva [2010] 1 LRC 763 at paragraphs [12]-[13]. 70

**CASE SIGNIFICANCE**

The decision establishes binding or persuasive precedent within its jurisdiction

**OFFICIAL CASE DOCUMENTS**

The Judgment