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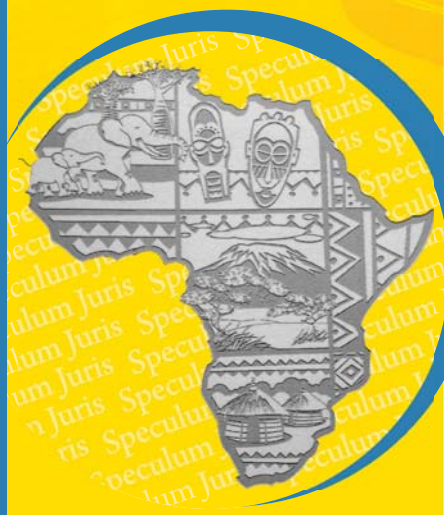

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Prosecuting and Punishing Persons for Sending Messages of Obscene, Offensive, Threatening or Menacing Character under the Mauritian Information and Communication Technologies Act

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Abstract

Jurisprudence from Mauritian courts shows that people have been convicted of offences under the Information and Communication Technologies Act. These offences have been mostly committed using mobile phones. The most common offences relate to making phone calls and sending text messages which are obscene, indecent, abusive, threatening, annoying, inconveniencing, menacing, false or misleading, or likely to cause distress or anxiety. Although in some cases people have been convicted of posting videos or audio on YouTube, Facebook, Viber and sending out emails. One of the challenges faced by courts is that many words in section 46 of the Act which creates offences are not defined and courts have to rely on dictionaries. It is argued that the constitutionality of section 46 could be challenged successfully. Another challenge is that the punishments provided for in the Act are not applicable to juristic persons. Recommendations to address those challenges are made here. The article also highlights how the police's IT unit, the telephone companies, and the judiciary work together to ensure the availability of evidence needed to prosecute those who have allegedly committed an offence under the Act. It is argued that some of the offences under the Act are of strict liability nature and that Mauritian courts have no jurisdiction over offences under section 46 of the Act when committed abroad.

Keywords: Mauritius; Information; Communication Technologies Act; prosecution; punishment; investigation; telephone companies

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1 INTRODUCTION

The Mauritian Information and Communication Technologies Act (the Act) came into force in 2001.[1] The purposes of the Act are "to establish the Information and Communication Technologies Authority, the Information and Communication Technologies Advisory Council, the Information and Communication Technologies Appeal Tribunal and to provide for the regulation and democratisation of information and communication technologies and related matters." The Act is supplemented by a number of regulations, issued by the Minister,[2] dealing with issues such as the universal service fund,[3] the rules of procedure of the Information and Communication Technologies Appeal Tribunal,[4] quality service,[5] licencing and fees,[6] fraud tracking account charge,[7] cost for those appearing before the Appeals Tribunal,[8] and transfer of undertaking date.[9] Since the coming into force of the Act, Mauritian courts have handed down several judgments interpreting or applying its different sections. In these judgments, courts have dealt with issues such as, awarding a plaintiff damages against the defendant for sending an offensive email;[10] clarifying the power of the police in arresting a person for allegedly committing an offence under the Act;[11] and what amounts to reasonable suspicion before the police can lawfully arrest a person for allegedly committing an offence under the Act.[12] Other issues addressed in these judgments have included whether the offence of using an information and communication service for the purpose of causing annoyance to another person is contrary to the accused's constitutional right to freedom of expression;[13] the manner in which the charges against the accused should be phrased;[14] and whether it is necessary for the prosecution to specify the type of ICT device used in the commission of the offence.[15]

The Act has different parts. Part I deals with the definitions and application of the Act; part II deals with the establishment of the Information and Communication Technologies Authority (the Authority) and its Board of Directors; part III deals with the objects, powers and functions of the Authority; and part IV provides for the financial provisions of the Authority. Part V deals with the licencing of persons, both natural and juristic, to conduct ICT businesses; part VI establishes the Information and Communication Technologies Advisory Council; part VII establishes the Information Technologies Appeal Tribunal; and part VIII deals with the miscellaneous issues under the Act which include offences and penalties for such offence under the Act. Section 46 of the Act creates 28 offences. Jurisprudence from Mauritian courts shows that not all offences have been prosecuted under the Act. People have been prosecuted and convicted for offences such as using an information and communication service for the purpose of causing needless anxiety to another person,[16] for the transmission of a message of an obscene character,[17] indecent character,[18] which was grossly indecent,[19] grossly offensive,[20] for the purpose of causing annoyance to another person,[21] and causing inconvenience to another person.[22] Case law also shows that some suspects have been prosecuted and acquitted of offences such as causing a licensee to provide a service to some other person without a payment;[23] using a telecommunication service for the purpose of causing annoyance because there was no evidence that the accused had made the telephone calls in question to the complainant;[24] there was no evidence that the message annoyed the complainant;[25] there was no evidence that the accused had the intention to commit the offence;[26] there was no evidence that the accused used obscene words and that it was the accused who used the public telephone to call the complainant;[27] there was no evidence that the accused has given

16 *Police v Bonomally* 2016 INT 190; *P v Carver & Another* 2018 INT 68.
17 *Police v MDG Collet* 2013 INT 15; *Police v VA Gowry* 2013 INT 336; *Police v A Noruthun* 2016 INT 75; *P v Goomanee* 2017 INT 281 (contrary to s 46(h)(i)).
18 *Police v Baboolall* 2017 INT 20.
19 *Police v Jean Charles M* 2017 INT 421 (the accused pleaded guilty).
20 *P v Bhagirath* 2016 INT 484.
21 *Police v MDGCollet* 2013 INT 15; *Police v VA Gowry* 2013 INT 336; *Police v A Noruthun* 2016 INT 75; *Police v Jhingoor* 2013 INT 111 (contrary to s 46(h)(ii)); *Police v Jhingoor* 2013 INT 111 (the accused pleaded guilty to both charges and the facts are silent on the conduct leading to the charges).
22 *Police v Vinay Satyadhan Sujeeun* 2016 INT 528 (contrary to s 46(h)(ii)).
23 *Police v Baharay & anor* 2013 INT 332 (the accused was convicted of using an information and communication service for the transmission of a message of an obscene character and using an information and communication service for the purpose of causing annoyance).
24 *Police v Goodeeal* 2011 INT 256.
25 *Police v Joykurrun* 2016 INT 544.
26 *P v Jhummon* 2015 INT 191.
27 *Police v Lokye* 2013 INT 37 (he was prosecuted for using an information and telecommunication service for the

another person instructions to commit the offence against the complainant;[28] and that there was no evidence that the accused had committed the offence.[29] The device which was used to commit the offence is not an element of the offence. What matters is that the accused used "an information and communication service" to commit an offence. Section 2 of the Act defines an information and communication service to mean "any service involving the use of information and communication technologies including telecommunication services." Section 2 of the Act defines "information and communication technologies" to mean "technologies employed in collecting, storing, using or sending out information and include those involving the use of computers or any telecommunication system." This explains why some people have been convicted of posting content on social media sites such as Facebook and YouTube and on some dating sites.

There are likely challenges faced by courts in dealing with cases of people prosecuted for committing offences under the Act. The most important challenge is that many terms used in the Act, in particular in the section on offences, are not defined and courts have had to rely on dictionaries to define these words. Another likely challenge is that although some of offences under the Act may be committed by both natural and juristic persons, the penalties provided for under the Act, strictly interpreted, cannot be imposed on juristic persons. In this article, the author suggests ways in which the Act may be amended to address those shortcomings. The author also highlights how the police's IT unit, the telephone companies, and the judiciary work together to ensure the availability of evidence needed to prosecute those who have allegedly committed offences under the Act. The author will first discuss the issue of the court with jurisdiction over the offences in the Act.

2 COURT WITH JURISDICTION

In terms of section 47(1), "[a]ny person who commits an offence under this Act, shall, on conviction, be liable to a fine not exceeding 1,000,000 rupees and to imprisonment for a term not exceeding 5 years." Section 47(2) of the Act provides for other penalties such as forfeiture, cancellation of a licence and suspension of a licence. Under section 47(3), an offence under the Act "shall be triable by the Intermediate Court"[30] and "not triable by a District Court."[31] The jurisdiction of these respective courts is provided for in the District and Intermediate Courts (Criminal Jurisdiction) Act[32] read together with part III of Courts Act.[33] However, in *Police v Edouard*[34] the District Court convicted the accused for "using an information and communication service for the reception of a message which is of an obscene character in breach of sections 46(h)(i) and 47(1) of the Information and Communication Technologies Act." It is argued that in the light of section 47(3)(b) which clearly states that the offence under the Act shall "not be triable by a District Court", the Court was not competent to try the accused, and his right to a fair trial was violated.[35] This means that the accused's conviction had to be set aside on appeal. Case law from the Supreme Court demonstrates that prosecuting an accused before a court which does not have jurisdiction over the offence is a serious irregularity which nullifies the proceedings and the conviction and sentence must be set aside.[36]

transmission of a message which is of an obscene character).

28 *Police v Mayadevi Ramkaylawon* 2011 INT 249.

29 *Police v M Teeluck* 2014 INT 238.

30 Section 47(3)(a).

31 Section 47(3)(b). However, the District Court can release a person who is facing charges under the Act on bail. See *Chalon Trevor William v Police* 2011 BMB 9 (the District Court released the accused on bail although he was being prosecuted for wilfully, unlawfully and knowingly sending a false message to the complainant using an information and communication service, to wit "a forged attachment letter emanating from the Prime Minister's Office", in breach of ss 46 (g) and 47 of the Information and Communication Technologies Act 2001). See also *Nitindrassen Siven Chinien v Police* 2013 BRC 22.

32 District and Intermediate Courts (Criminal Jurisdiction) Act, Cap 174.

33 Courts Act Cap 168 (Act 41 of 1945).

34 *Police v Edouard* 2016 ROD 21.

35 This right is provided for under Art 10 of the Constitution of Mauritius.

36 See *Narrainen B & Ors v The State* 2015 SCJ 266 (and the cases discussed therein).

Another issue is whether Mauritian courts have jurisdiction over a person who, while abroad, sends a message of a character described in section 46 to a person based in Mauritius and after sending that message he/she (the sender) travels to Mauritius. In other words, do Mauritian courts have jurisdiction over offences under section 46 which are committed by persons, whether Mauritian nationals, based abroad? The Supreme Court held, "one cannot, for one moment, doubt that a sovereign Parliament has power to enact laws with extra-territorial operation."[37] Unlike other pieces of legislation such as the Computer Misuse and Cybercrime Act[38] and the Dangerous Drugs Act,[39] the Information and Communication Technologies Act is silent on the issue of whether Mauritian courts have jurisdiction over the offences under the Act when they are committed abroad. This creates room for the argument that the literal interpretation of the Act shows that had legislators wanted to confer jurisdiction on courts for offences committed abroad, nothing would have prevented them doing so. This means that they do not have such jurisdiction. This literal interpretation can only be departed from by courts if it would result in an absurdity.[40] It is not the case in this instance because jurisdiction must be conferred upon courts by statute. In *Joomeer N v State*[41] the Supreme Court held that:

> The legal system of a country and its rule of law are based on the concept of the nation state whereby the country's legislature is empowered to legislate for matters within its jurisdiction. It has no competence to legislate beyond its borders. Country A cannot legislate for country B any more than country B can legislate for country A. There is, therefore, a presumption regarding the application of legislations in favour of domestic competence.[42]

The Court added that:

> However, where a nation state seeks to legislate to cover matters beyond its borders, it may do so for good cause and by an express provision. It may do so, for example, under the nationality principle, the protective principle, passive personality principle or the universal principle of international law which allows national jurisdictions to claim competence over matters in foreign jurisdictions. The scenario that a nation state should seek to legislate to exclude national competence and cover only extra-territorial matters should be rare and require express provision and clear justification.[43]

The Supreme Court has held that where legislation expressly provides that Mauritian courts have jurisdiction over offences committed outside Mauritius, courts will exercise such jurisdiction.[44] Therefore, Mauritian courts have no jurisdiction over offences under section 46 of the Information and Communication Technologies Act when they are committed by a person based abroad.

3 DEFINING ELEMENTS OF SOME OF THE OFFENCES UNDER THE ACT

Case law indicates that in most cases, the offences under the Act have been committed by individuals who have used their mobile phones to make calls or send messages or photographs to the complainants. However, there have been instances where the offences have been committed using computers such as laptops[45] and some have been committed by posting the content to Facebook,[46] using Viber,[47] uploading videos on YouTube,[48] and posting an audio file "on the social networks Facebook, Vimeo, and You Tube."[49] One of the challenges is that some of the elements of the offences under section 46(h) and (ga) of the Act are not defined

37 *Jeeawoody Z v The Queen* 1989 SCJ 356, 2.
38 The Computer Misuse and Cybercrime Act, Act No. 22 of 2003. Section 19(2) of this Act provides that: "The Intermediate Court shall also have jurisdiction where the act constituting an offence under this Act has been committed outside Mauritius - (a) on board a Mauritian ship; or (b) on board an aircraft registered in Mauritius."
39 See s 34(b) of the Dangerous Drugs Act 1986.
40 See *Independent Commission against Corruption v Peermamode M.R.A.F.E. and The Director of Public Prosecutions v Peermamode M.R.A.F.E.* 2012 SCJ 104 (where the Supreme Court dealt with the issue of whether Mauritian courts have jurisdiction over corruption committed in Mauritius).
41 *Joomeer N v State* 2013 SCJ 413.
42 *Joomeer N v State* para 29.
43 *Joomeer N v State* para 30.
44 *MA Coowar v The State* 1999 SCJ 376 1999 MR 187; *The State v Bibi Fatemah Dilmamode & Anor* 1995 SCJ 416; 1995 MR 186.
45 *Police v Ramnarain Yam Youne* 2015 PL3 54.
46 *Police v Moonesamy* 2014 INT 111; *Police v K Randhay* 2020 INT 99; *Venkataredy D. v The State* 2021 SCJ 1
47 *Police v Roussety Jean Fabrice* 2017 INT 131.
48 *Nitindrassen Siven Chinien v Police* 2013 BRC 22.
49 *Police v Ramnarain Yam Youne* 2015 PL3 54, 1.

and courts have to rely on dictionaries for definitions. For example, in *Police v V. A. Gowry*,[50] the accused was prosecuted for the offence using an information and communication service for the transmission of a message which is of an obscene character and using an information and communication service for the purpose of causing annoyance. In convicting the accused of the two offences, the court observed that:

> The issue is therefore whether the text messages are of an obscene character and were for the purpose of causing annoyance. As 'obscene' and 'annoyance' are not defined in the Act, they have to be given their ordinary dictionary meaning. According to the Concise Oxford English Dictionary, Tenth Edition, Revised 'obscene' means "1 offensive or disgusting by accepted standards of morality and decency. 2 repugnant." and 'annoy' which has as derivative 'annoyance', means "1 make a little angry. 2. archaic harm or attack repeatedly." A reading of the text messages as reproduced at Counts 1 to 4 of the information leave [sic] no doubt as to their obscene character and capacity to cause annoyance, since they are not only disparaging to the receiver, but also contain several swear words in the Creole language.[51]

In *Police v Joykurrun*[52] in which the accused was prosecuted for and acquitted of using an information and communication service for the purpose of causing annoyance, the court adopted another definition of the word "annoyance" when it held that:

> [T]he main element of the present offence is the element of causing annoyance. Now annoyance has not been defined under the Act so that in such circumstances, the ordinary dictionary meaning should be resorted to, and according to concise oxford [sic] dictionary, seventh edition, 'annoyance' is derived from the word 'annoy' which is defined as causing slight anger or mental distress, or to molest or harass.[53]

In *Police v Bundhoo Karuna*,[54] the court relied on the *Oxford Dictionary* and defined "annoyance" to mean "the feeling or state of being annoyed; irritation."[55] The court adopted a similar definition in *Police v Ghoorun Komalchandra*.[56] In *Police v A. Noruthun*[57] the accused was also prosecuted for the offences using an information and communication service for the transmission of a message which is of an obscene character and using an information and communication service for the purpose of causing annoyance. In convicting the accused, the court held that:

> I am unable to agree with the submission of counsel that threatened would not constitute annoyance; it is clear that if the complainant felt threated and bad, that would obviously be causing annoyance. I am also unable to agree with counsel for the accused that there should have been harassment and that a single message would not constitute annoyance.[58]

The above cases show that because of the fact that the Act does not define "annoyance", which is the most important element of the offence in question, courts have resorted to dictionaries and the result has been the adoption of different definitions. This practice has also continued with regard to other offences under the Act as the discussion below illustrates. In *Police v A. Gundawy*[59] in which the accused was prosecuted and convicted of using an information and communication service for the transmission of a message which is of an obscene character, the court observed that:

> One essential element of the offence which the Prosecution has to prove is that the words allegedly used by the accused conveyed a message which was of obscene character. The word 'obscene' has not been defined in the Information and Communication Technologies

50 *Police v VA Gowry* 2013 INT 336.

51 *Police v VA Gowry* paras 9–10 [Emphasis removed]. See also *Police v Auckburally Abdool Motalib* 2008 INT 340, in which the court relied on the *Concise Oxford Dictionary* to define the word "obscene."). In *Police v D Lokee* 2016 INT 290; *Police v Sunil Dutt Tarachand* 2016 INT 251; *Police v D Foolchand and Anor* 2014 INT 308; *Police v HK Shoodihal* 2016 INT 282; *Police v Myrielle Jacqueline Lacour* 2016 INT 299; *Police v R Ramcharan* 2016 INT 551; *Police v S Roodur* 2018 INT 177; *Police v J Seegum* 2015 INT 334; *Police v Bundhoo Karuna* 2017 INT 133; courts relied on the *Oxford Dictionary* to define the word "annoyance".)

52 *Police v Joykurrun* 2016 INT 544

53 *Police v Joykurrun* 1. [Emphasis removed]. See also *Police v Naujeer* 2013 INT 8, 3; *Police v Ramlall* 2016 INT 548, 2 where the court adopts the same definition of "annoyance."

54 *Police v Bundhoo Karuna* 2017 INT 133.

55 *Ibid* 5. see also *Police v Parboteeah Shivranee* 2017 INT 184, 8; *Police v Ramasawmy Brinda* 2016 INT 458, 9, where the court used the exact same definition from the same dictionary.

56 *Police v Ghoorun Komalchandra* 2018 INT 77, 3.

57 *Police v A Noruthun* 2016 INT 75.

58 *Police v A Noruthun* 3.

59 *Police v A Gundawy* 2018 INT 137.

> Act. In the circumstances, the word 'obscene' has to be given its ordinary dictionary meaning. According to the Oxford Dictionary, 'obscene' means offensive or outrageous, that is, very shocking and unacceptable. In the present matter, it is clear from the messages cited in the information that those messages are of obscene character. The lengthy message contains disparaging comments and numerous swear words. [The complainant] testified that she was disturbed by these messages. Consequently, the Prosecution has established that the messages in question are of an obscene character.[60]

However, in *Police v Ramasawmy Brinda*,[61] the Court used the *Oxford Dictionary* to define the term "obscene" as "offensive or disgusting by accepted standards of morality and decency."[62] As is with the situation with the cases above on "annoyance", courts have also adopted different definitions for the term "obscene." In *Police v Johann Joseph Bernard Tyack*[63] the accused was charged with, *inter alia*, using telecommunications service for the transmission of a message which is grossly offensive. Because of the fact that the Act does not define the word "offensive", the court had to rely on the 11th edition of the *Concise Oxford Dictionary* and on the jurisprudence from the House of Lords (UK) for the meaning of the word.[64] The court followed the same approach in *Police v Myrielle Jacqueline Lacour*.[65] However, in *Police v Ramasawmy Brinda*, the court relied on the dictionary as opposed to both the dictionary and case law from the United Kingdom to define the term "offensive."[66] In *Police v K. Ponnoosamy*[67] the accused was prosecuted for using an information and communication service for the transmission of a message which is of a menacing character and the court relied on the *Oxford Dictionary* to define the word "menacing"[68] to conclude that indeed the messages in question were of menacing character. In *Police v Karuna Gunnoo*[69] in which the accused was prosecuted for using telecommunications service for the purpose of causing needless anxiety and inconvenience to another person, the court relied on the *Concise Oxford English Dictionary* to define the words "needless", "anxiety" and "inconvenience."[70] In *Police v Parboteeah Shivranee*,[71] the court relied on the *Oxford Dictionary* to define the term "indecent" as being "morally offensive especially because it involves sex or being naked."[72] However, in some cases the accused are convicted without the court bothering to explain or define the meaning of the offences in question.[73] An accused cannot be convicted of sending a message which caused inconvenience to the complainant unless the court is satisfied that the word used by the accused is capable of inconveniencing the complainant.[74]

The above discussion illustrates that in some cases courts have adopted different definitions for the same term. This creates uncertainty as the accused, or his lawyer, may not know the exact elements of the offence he or she is charged with. It could also compromise the accused's right to a fair trial because the offence is not defined in the Act and courts must use different sources to give meaning to the offence. This may make it difficult for the accused to prepare for his defence because he does not know in advance the court's understanding of the elements

60 *Police v A Gundawy* 5. emphasis removed.
61 *Police v Ramasawmy Brinda* 2016 INT 458.
62 *Police v Ramasawmy Brinda* 8. See also *Police v Roussety Jean Fabrice* 2017 INT 131, 4.
63 *Police v Johann Joseph Bernard Tyack* 2015 INT 350.
64 *Police v Johann Joseph Bernard Tyack*, 6–7.
65 *Police v Myrielle Jacqueline Lacour* 2016 INT 299. See also *Police v Propsper* 2016 INT 407 (the court followed the same approach to define the term "indecent").
66 *Police v Ramasawmy Brinda* 2016 INT 458, 8. See also *Police v Roussety Jean Fabrice* 2017 INT 131, 6.
67 *Police v K Ponnoosamy* 2018 INT 82.
68 *Police v K Ponnoosamy* 2018 INT 82. See also *Police v S Roodur* 2018 INT 177, 6; *Police v Gyah Roshan* 2017 INT 132, 6; *Police v Ramasawmy Brinda* 2016 INT 458, 9; *Police v Soojhawon Suttianand* 2017 INT 380, 7; *Police v Pothana* 2015 INT 460, 2 (the court relied on the *Concise Oxford Dictionary*(10 edn) to define the term "menacing").
69 *Police v Karuna Gunnoo* 2015 INT 433. See also *Police v Seepaul Nandeo* 2018 INT 79 (for the definition of "needless" and "anxiety").
70 *Police v Karuna Gunnoo* 2. See also *Police v Bungaroo Pratima* 2017 INT 86, 7; *Police v Jan Louis Antonio* 2017 INT 240; *Police v Soojhawon Suttianand* 2017 INT 380, 6, where the courts relied on the *Oxford Dictionary* to define "anxiety'"and "needless." In *Police v Parboteeah Shivranee* 2017 INT 184, 4, the court relied on the *Oxford Dictionary* to define the word "inconvenience".
71 *Police v Parboteeah Shivranee* 2017 INT 184.
72 *Police v Parboteeah Shivranee* 5.
73 For example, in *Police v V Gopee* 2018 INT 141, the cause does not define "inconvenience" but the accused was convicted of using an information and communication service for the purpose of causing inconvenience).
74 *Police v Parboteeah Shivranee* 2017 INT 184, 4.

of the offence in question.[75] The court's understanding of the elements of the offence only becomes clear to the accused once the court has relied on a dictionary. Sometimes courts do not even mention the edition of the dictionary they have relied on. It must be remembered that Article 10(2)(c) of the Constitution provides that "[e]very person who is charged with a criminal offence shall be given adequate time and facilities for the preparation of his defence." The Supreme Court has held that this right is fundamental and cannot be taken away by a court.[76] It has to be invoked by the accused.[77] Denying the accused his/her right under Article 10(2)(c) vitiates the proceedings.[78] No legislation should take away the right under Article 10(2)(c).[79] The Supreme Court held that the right under Article 10(2)(c) "might require the full disclosure in advance by the prosecution of all material evidence for or against the accused. The only exception relates to evidence which is privileged e.g. on ground of public interest immunity."[80] In order to strengthen the accused's right to a fair trial, Mauritius will have to follow one of the two approaches adopted in countries where computer-related legislation has created offences without defining the relevant terms.

Courts have taken different approaches in countries in which communication and information technology related legislation does not define words such as "indecent" or "menace." In the United Kingdom courts have defined those terms and some accused have been convicted of relevant offences.[81] The same approach has been followed in Australia.[82] However, in India, the Supreme Court held that such legislation is unconstitutionally vague. Section 66A of the Indian Information Technology Act of 2000 provided that:

> Any person who sends, by means of a computer resource or a communication device,- (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

In *Shreya Singhal v U.O.I.*[83] the constitutionality of section 66A was challenged before the Supreme Court of India on the ground that it violated the right to freedom of expression and that:

> in creating an offence, Section 66A suffers from the vice of vagueness because … none of the aforesaid terms are even attempted to be defined and cannot be defined, the result being that innocent persons are roped in as well as those who are not. Such persons are not told clearly on which side of the line they fall; and it would be open to the authorities to be as arbitrary and whimsical as they like in booking such persons under the said Section.[84]

The government argued that the words in section 66A were clearly defined in Collin's dictionary and that they were not vague.[85] The court referred to jurisprudence from different countries to the effect that legislation which creates a vague offence has to be struck down because it is impossible for people to know what is permissible and what is not.[86] The court added that "it is quite clear that the expressions used in 66A are completely open-ended and undefined."[87] The court held further that "every expression used is nebulous in meaning. What may be offensive

75 Article 10(2) of the Constitution provides that every person who is charged with a criminal offence "shall be presumed to be innocent until he is proved or has pleaded guilty." In *Abongo LA v The State* 2009 SCJ 81; 2009 MR 1, 3, the Supreme Court held that Art 10(2) of the Constitution "means that the burden to prove a criminal offence against an accused is on the prosecution."
76 *Lamarques v The Queen* 1974 MR 291.
77 *Bégué v The Queen* 1973 MR 278; 1973 SCJ 129.
78 *Arlando R. v The State* 2004 SCJ 101; 2004 MR 1.
79 *The State v Fangamar L.D.L.* 2008 SCJ 25.
80 *Maigrot B v The District Magistrate of Riviere Du Rempart & Ors* 2004 SCJ 299, 5.
81 See for example, *Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (Admin) (27 July 2012) (when dealing with a message of menacing character); *Chabloz v Crown Prosecution Service* [2019] EWHC 3094 (Admin) (31 October 2019) (the accused uploaded an offensive video on YouTube).
82 See for example, *Monis v The Queen* [2013] HCA 4 (27 February 2013).
83 *Shreya Singhal v UOI* [2015] INSC 251 (24 March 2015).
84 *Shreya Singhal v UOI* para 5.
85 *Shreya Singhal v UOI* para 51.
86 *Shreya Singhal v UOI* paras 52–68.
87 *Shreya Singhal v UOI* para 69.

to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another."[88] The court added that case law from England in which some of those terms have been defined by courts confirms the vague nature of those words.[89] The court concluded that section 66A was unconstitutional because it was vague and also violated the right to freedom of speech and could not be saved by the reasonableness test under the Constitution.

A similar issue arose before the High Court of Kenya. Section 29 of the Kenya Information and Communication Act[90] provided that:

> A person who by means of a licensed telecommunication system—(a) sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or (b) sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both.

In *Geoffrey Andare v Attorney General*[91] the petitioners argued that section 29 was unconstitutional because it was, *inter alia*:

> vague and over-broad especially with regard to the meaning of 'grossly offensive', 'indecent', 'obscene 'menacing', 'causing annoyance' 'inconvenience' or 'needless anxiety'…[T]he section offends the principle of legality which requires that a law, especially one that limits a fundamental right and freedom, must be clear enough to be understood and must be precise enough to cover only the activities connected to the law's purpose.[92]

The petitioner added that:

> besides the creation of vague criminal offences which leaves it to the court's subjective assessment whether a defendant is convicted or acquitted, the section offends the principle of legality that legislation ought not to be so vague that the subject has to await the interpretation given to it by judges before he can know what is and what is not prohibited; and that the haziness of the definition of the offence under the section leaves too wide a margin of subjective interpretation, misinterpretation and abuse in determining criminal penalties.[93]

He further argued that:

> since none of the terms are defined in the Act or are capable of precise or objective legal definition or understanding, the result is that innocent persons are roped in as well as those who are not … [T]he section does not tell persons such as himself on which side of the line they fall, and this enables authorities to be as arbitrary and as whimsical as they like in booking persons under the section ... [T]he provision is void for vagueness by imposing an offence without defining the target and the conduct sought to be prohibited; that sub-section (a) does not peg the commission of the offence on the intention or 'mens rea' of the sender of the material allegedly causing harm, but merely whether the message is subsequently considered 'grossly offensive', 'indecent', 'obscene' or 'menacing' by an unnamed, indefinite and unspecified person.[94]

The High Court observed that indeed the Act does not define the relevant words under section 29. In holding that section 29 was unconstitutional, the court held that:

> [T]here is no definition in the Act of the words used. Thus, the question arises: what amounts to a message that is 'grossly offensive', 'indecent' obscene' or 'menacing character'? Similarly, who determines which message causes 'annoyance', 'inconvenience', 'needless 'anxiety'? Since no definition is offered in the Act, the meaning of these words is left to the subjective interpretation of the Court, which means that the words are so wide and vague that their meaning will depend on the subjective interpretation of each judicial officer seized of a matter … [T]herefore, that the provisions of section 29 are so vague, broad and uncertain that individuals do not know the parameters within which their communication falls, and the provisions therefore offend against the rule requiring certainty in legislation that creates

88 *Shreya Singhal v UOI* para 76.
89 *Shreya Singhal v UOI* paras 79–82.
90 Information and Communication Act, Cap 411A.
91 *Geoffrey Andare v Attorney General & 2 Others* [2016] eKLR.
92 *Geoffrey Andare v Attorney General & 2 Others* para 9.
93 *Geoffrey Andare v Attorney General & 2 Others* para 10.
94 *Geoffrey Andare v Attorney General & 2 Others* paras 11–12.

criminal offences.[95]

The court emphasised that "the provisions of section 29 are so wide and vague that they offend the requirements with regard to law that carries penal consequences."[96] Against that background, the court declared section 29 unconstitutional.

In light of the above jurisprudence from India and Kenya, it may be a good idea for the Act to be amended to define or describe the relevant offences.[97] The Supreme Court could, when the opportunity presents itself when dealing with relevant cases under section 46 of the Act, follow the Indian Supreme Court and the Kenyan High Court approach and declare section 46 (h) and (ga) unconstitutional. Otherwise, the Supreme Court, would have to define these terms so that the Intermediate Court follows one definition which has been developed by the Supreme Court.[98] Case law indicates that where the Supreme Court has relied on a dictionary or another source to define a word which has not been defined in legislation, that definition has been followed in subsequent case law.[99]

4 NATURE OF THE OFFENCES UNDER THE ACT: *MENS REA AND ACTUS REUS*

Another issue which arises in the context of the Act is whether the offences under section 46 of the Act require *mens rea* or whether they are strict liability offences. Section 46 provides for different offences. For some of these offences, the accused must have committed the act in question "with intent"[100] or "knowingly"[101] or "wilfully"[102] or "dishonestly."[103] In some instances, the accused is required to have acted fraudulently.[104] In cases of this nature, there is no doubt that *mens rea* is required for the accused to be convicted.[105] However, in some cases the Act does not expressly provide that intention is required. For example, section 46(a) provides that a person commits an offence who "by any form of emission, radiation, induction or other electromagnetic effect, harms the functioning of an information and communication service, including telecommunication service." Likewise, section 46(ga) provides that a person commits an offence who "uses telecommunication equipment to send, deliver or show a message which is obscene, indecent, abusive, threatening, false or misleading, or is likely to

95 *Geoffrey Andare v Attorney General & 2 Others* paras 77–78.

96 *Geoffrey Andare v Attorney General & 2 Others* para 80.

97 The Ugandan High Court decision also highlights the challenges of dealing with an offence which is not defined in the Act. See Stella Nyanzi v Uganda (Criminal Appeal No. 79 of 2019) [2020] UGHCCRD 1 (20 February 2020) (defining the word "obscene.")

98 The Supreme Court has relied on, *inter alia*, the dictionaries, to define some words used in legislation for criminalising some conduct. This means that the court has given these words ordinary meaning. See for example, *Director of Public Prosecutions v Pick and Buy Limited* 2018 SCJ 413 (to define "foreign matter" in the Food Act 1974); *De Senneville HRB v The State* 2019 SCJ 41 (to define the term "entertainment" under the Tourism Authority Act); *Geddedu A v The State* 2017 SCJ 358 (to define the word "drive" in the Road Traffic Act).

99 See for example, *Bissessur Y v The ICAC & Anor* 2018 SCJ 72.

100 For example, s 46(b) and (c) provides that a person commits an offence who, "(b) with intent to defraud or to prevent the sending or delivery of a message, takes an information and communication message, including telecommunication message from the employee or agent of a licensee; (c) with intent to defraud, takes a message from a place or vehicle used by a licensee in the performance of his functions."

101 Section 46 provides that a person commits an offence who "(g) knowingly sends, transmits or causes to be transmitted a false or fraudulent message."

102 Section 46 provides that a person commits an offence who "(e) wilfully or negligently omits or delays the transmission or delivery of a message"; "(k) wilfully damages, interferes with, removes or destroys an information and communication installation or service including telecommunication installation or service maintained or operated by a licensee; (ka) wilfully tampers or causes to be tampered the International Mobile Station Equipment (IMEI) of any mobile device." See *Jean Louis C.S. v The State* 2000 SCJ 153 for the court's interpretation of what is required of a prosecutor in cases where legislation provides that the accused wilfully committed an offence.

103 Section 46 provides that a person commits an offence who "(i) dishonestly obtains or makes use of an information and communication service, including telecommunication service with intent to avoid payment of any applicable fee or charge."

104 Section 46 provides that a person commits an offence who "(j) by means of an apparatus or device connected to an installation maintained or operated by a licensee - (i) defrauds the licensee of any fee or charge properly payable for the use of a service; (ii) causes the licensee to provide a service to some other person without payment by such other person of the appropriate fee or charge; or (iii) fraudulently installs or causes to be installed an access to a telecommunication line."

105 See *Director of Public Prosecutions v Maroam T* 2014 SCJ 56, for what the prosecution must prove in cases where knowledge is an element of the offence.

cause distress or anxiety." Section 46(h) provides that a person commits an offence who:

> Uses … an information and communication service, including telecommunication service, - (i) for the transmission or reception of a message which is grossly offensive, or of an indecent, obscene or menacing character; or (ii) for the purpose of causing annoyance, inconvenience or needless anxiety to any person; (iii) for the transmission of a message which is of a nature likely to endanger or compromise State defence, public safety or public order.

It is not clear whether the offences above require *mens rea* or whether they are strict liability offences. To understand whether such offences are of strict liability nature, the starting point is to refer to case law from Mauritius. In *DPP v Jugnauth & Anor*[106] the Privy Council, in a case from Mauritius, held that:

> The presumption that Parliament does not intend to make criminals of persons who are in no way blameworthy leads to the proposition that every component element of the *actus reus* of a statutory offence should be associated with a corresponding *mens rea* unless the legislative context otherwise requires … The presumption is particularly strong where … the offence is clearly of a serious character and punishable by a lengthy term of penal servitude.[107]

The Privy Council added that the presumption has to be "rebutted by any express provision or by necessary implication" otherwise it stands.[108] Should the presumption stand, "there is an obligation on the prosecution to prove *mens rea* in relation to each element of the *actus reus* of the offence."[109] It is therefore important to look at "the objects and terms of the statute" to determine whether the offence in question requires *mens rea*.[110] In cases where legislation is meant to deal with an issue of "social concern" courts will easily interpret such legislation as providing for strict liability offences.[111]

It is argued that the offences under section 46(ga) are of strict liability nature. In other words, "there is [no] need for the prosecution to establish *mens rea* as an element of the" offence.[112] This is because of the fact that had the legislature wanted to require *mens rea* in such offences, nothing would have prevented it from doing so as it did with other offences under the same section. It is also important to remember that section 46(ga) was inserted in the Act by the 2016 Information and Communication Technologies (Amendment) Act.[113] In the same Amendment Act, section 46(ga) was inserted in the principal Act which provides that a person commits an offence under the Act who "knowingly provides information which is false or fabricated." It is clear that in the case of an offence under section 46(ga), *mens rea*

106 *DPP v Jugnauth & Anor* 2018 PRV 30.

107 *DPP v Jugnauth & Anor* para 20.

108 *DPP v Jugnauth & Anor* para 20.

109 *DPP v Jugnauth & Anor* para 20. See also *One Shabs Ltd v Ministry of Health and Quality of Life* 2017 SCJ 160 in which the Supreme Court referred to many cases dealing with the factors that have to be considered in determining whether the offence in question requires *mens rea*. In *The Mauritius Revenue Authority v Camel Motors Ltd* 2015 PL3 104 para 7.2, the court in holding that the offence in question was not of a strict liability nature, considered the following factors "(a) the aim of the Act which is to prevent the evasion of customs duty and the smuggling of goods; and (b) the severe penalty of three times the dutiable value of the goods, the possibility of imprisonment for a term not exceeding eight years, and the forfeiture of the goods; all point to greater weight to be attached to the presumption that mens rea is required."

110 *Attorney General v Moonsamy* 1959 MR 295, 4. See also *Beezadhur T v Independent Commission Against Corruption & Anor* 2013 SCJ 292, 13, where the Supreme Court held that the anti-money laundering legislation created strict liability offences because "[t]he whole purpose and the main objectives of the Act are to offer a legislative framework to combat money laundering and the financing of terrorism in Mauritius which are of great public concern and may pose a real threat with serious consequences to the economy of the country, its political stability and be a social danger, and to bring Mauritius into line with the recommendations of the International Monetary Fund ("IMF"), the Financial Action Task Force ("FATF") and other international anti-money laundering standards."

111 *Director of Public Prosecutions v IFRAMAC Limited* 1999 SCJ 9; 1999 MR 7, 7.

112 *Armon-Dressler S v Independent Commission Against Corruption* 2020 SCJ 139, 3. The position in the United Kingdom, see *Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (Admin) (27 July 2012) para 38 where the court held that "the mental element of the offence is satisfied if the offender is proved to have intended that the message should be of a menacing character (the most serious form of the offence) or alternatively, if he is proved to have been aware of or to have recognised the risk at the time of sending the message that it may create fear or apprehension in any reasonable member of the public who reads or sees it. We would merely emphasise that even expressed in these terms, the mental element of the offence is directed exclusively to the state of the mind of the offender, and that if he may have intended the message as a joke, even if a poor joke in bad taste, it is unlikely that the mens rea required before conviction for the offence of sending a message of a menacing character will be established."

113 Section 12 of the Information and Communication Technologies (Amendment) Act, No. 21 of 2016.

is required which is not the case with offences under section 46(ga). The drafting history of section 46(ga) also shows that *mens rea* was not intended to be an element of the offences in question. While presenting the Information and Communication Technologies (Amendment) Bill in Parliament on 15 November 2016 for the second reading, the Acting Prime Minister submitted that:

> The law is also becoming more severe as regards the use of telecommunication equipment to send, to deliver or to show a message which is obscene, indecent, abusive, threatening, false or misleading or is likely to cause distress and anxiety. Madam Speaker … this is a sector which is going so fast and one innovation often becomes viral and you have millions of people following that application. Today, in Mauritius from the figures which have been given to me, we are at the end of 2015, 140 per cent of our population in terms of mobile. So, we are 1.4 x1.3 million! We are almost 2 million mobiles in Mauritius! And, we have had a number of cases where people are tempted, in fact, wilfully or not or recklessly to use telecommunication equipment to send obscene, indecent, abusive, false or misleading information. We have had many cases. We have had few cases, in fact, involving students and there was one famous case.[114]

The above submission shows that whether the device was used wilfully or recklessly to send a message is immaterial. What matters is the use of the device. In other words, the sender's intention is irrelevant.

Another issue is that of the *actus reus* for the offences under section 46(ga) of the Act. A close examination of the cases discussed in this article where the accused have been convicted or acquitted of offences under section 46(ga) shows that for the prosecution to secure the accused's conviction, it has to prove three elements: that the accused sent the message; the message is of the character provided for under the section; and that he/she used the means provided for under the Act. Case law from the United Kingdom also shows that courts have followed the same approach when dealing with similar offences under the Communications Act (2003). Section 127(1)(a) of the Communications Act provides that "A person is guilty of an offence if he (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character over a public electronic communications network." In *Director of Public Prosecutions v Smith*[115] the High Court of England and Wales referred to section 127(1)(a) and held that:

> … (2) The actus reus of the offence consists of three elements, namely: (i) Sending a message. (ii) Of the proscribed character. (iii) By the defined means. (3) If all three elements are proved, the actus reus is complete at the time of the sending. It makes no difference whether the relevant message is received or read or not, or who (if anyone) actually receives it.[116]

Although the Kenyan High Court did not find it necessary to deal with issues of *mens rea* and *actus reus* under section 29 of the Kenya Information and Communication Act[117] which is worded in the same way as section 46(h) of the Mauritian Act, it observed in passing that:[118]

> [T]he petitioner and the interested party are correct in relation to section 29(a) of the Act. The section criminalises the act of sending a "message or other matter that is grossly offensive or of an indecent, obscene or menacing character … It does not require the mental element on the part of the sender of the message that would render his or her act criminal in nature. The offence appears to be premised on how others interpret the message. Section 29(b) does contain both elements of a criminal offence in that it criminalises the sending of a message that the sender knows 'to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person'.[119]

114 Republic of Mauritius, Sixth National Assembly Parliamentary Debates (Hansard) First Session Tuesday 15 November 2016, No. 32 of 2016, 114. Available at http://mauritiusassembly.govmu.org/English/hansard/Documents/2016/hansard3216.pdf (accessed 20-07-2020).

115 *Director of Public Prosecutions v Smith* [2017] EWHC 359 (Admin) (24 February 2017).

116 *Director of Public Prosecutions v Smith* para 28. See also para 33.

117 Information and Communication Act, Cap 411A.

118 *Geoffrey Andare v Attorney General & 2 Others* [2016] eKLR.

119 *Geoffrey Andare v Attorney General & 2 Others* para 102. [Emphasis removed].

The same situation prevails in Mauritius regarding the offences under section 46(h) and (ga). The sender's intention is irrelevant for him or her to be convicted of an offence. As the Supreme Court of Mauritius held in *Gopee V v The State*[120] in which the accused used the complainant's photograph on the dating site without his consent, "no reference is made to knowledge in" section 46(h)(ii) of the ICTA and therefore, "the state of mind which is required for an offence under section 46(h)(ii) is that the accused made use of the information and communication service for the unlawful purpose of causing annoyance, inconvenience or needless anxiety to another person."[121] The Court concluded that in determining whether the accused committed an offence under section 46(h)(ii), the following factors should be considered:

> (i) it is the conduct of the accused that needs to be analysed in all the circumstances of the case in order to determine whether he had the necessary *mens rea* at the material time; (ii) there is no need to prove that any "annoyance, inconvenience or needless anxiety" has actually been caused to any person; (iii) as a result the need to establish the precise identity of any particular person to whom "annoyance, inconvenience or needless anxiety" was caused does not arise.[122]

The Court emphasised that "an offence under section 46(h)(ii) of the ICTA does not require that any annoyance, inconvenience or needless anxiety is actually caused to any particular person who requires to be identified."[123] And that:

> What is required in order to establish the offence is that the appellant deliberately used the telecommunication service for the purpose of causing inconvenience "*to any person*". There is no need to prove that the person is known to the perpetrator of such an offence nor is there any need to prove the identity of that person.[124]

Because of the fact that there is no need for the prosecution to prove that the victim of the offence was actually inconvenienced or annoyed, an accused will be convicted even if the victim does not come to court and testify that indeed he/she was inconvenienced or annoyed by the message posted by the accused.[125]

5 THE COOPERATION BY DIFFERENT STAKEHOLDERS IN THE COLLECTION OF EVIDENCE

The availability or otherwise of evidence is one of the most important factors in determining whether a case will be won or lost. It is therefore critical that different role players get involved, where necessary. This is especially the case when the evidence in question is of a technical nature and the involvement of experts, for example IT experts, is of great importance. As the discussion below illustrates, the police's IT unit, the telephone companies and the judiciary have worked hand in hand in securing evidence needed to prosecute some of the people who have allegedly committed offences under the Act. In the prosecution for the offence in which a mobile phone was used, for example, for the transmission of a message of menacing character the prosecution will approach a mobile telephone company to confirm that the accused is the owner of the telephone number that was used in the commission of the offence and that the complainant was the owner of the number that the accused dialled or to which the message was sent.[126] However, sometimes the prosecution does not approach the telephone company to verify the phone number. The complainant will only get to confirm that the mobile number belongs to the accused after the accused's arrest.[127] In some cases the accused will confirm before court that he is the owner of the mobile phone number in question.[128] However, if the accused's sim card was stolen and used to commit an offence under the Act, the accused will be

120 *Gopee V v The State* 2020 SCJ 296.
121 *Gopee V v The State,* 7.
122 *Gopee V v The State,* 8. Emphasis in the original.
123 *Gopee V v The State,* 9.
124 *Gopee V v The State,* 9.
125 *Police v K Randhay* 2020 INT 99 (in this case the offensive Facebook post had been made against the Prime Minister of Mauritius). In *Police v Ramsaha Prithiviraj* 2020 INT 131, the court found that the accused had the intention of causing anxiety to the complainant when he sent her different emails.
126 *Bokhory D v The State* 2010 SCJ 421.
127 *Police v Bonomally* 2016 INT 190 (on a charge of using an information and communication service for the purpose of causing needless anxiety to another person, the complainant got to confirm that the accused was the owner of the cellphone number while at the police station).
128 *Police v MDG Collet* 2013 INT 15.

acquitted.[129] This shows that registration of sim cards is critical if the accused is to be identified as the offender. In Mauritius, there is a detailed procedure to be followed for one to register a sim card in one's name.[130] If the accused is registered as the owner of the sim card, he will be identified even if he throws it away after using it to commit an offence,[131] even if he denies its ownership,[132] changes his sim card several times,[133] or even if he allows another person to use it to commit an offence.[134] The challenge though is that in case of offensive emails, for example when the accused opened up a new email address for the purpose of sending messages to the complainant, the police are unable to trace the IP address of the sender and the accused's conviction can only be secured through his confession or admission.[135]

If the evidence is to be obtained from a telephone company, the police must follow the law otherwise the evidence may be inadmissible on the ground that it was illegally obtained.[136] Section 32 of the Act requires, *inter alia*, public operators, such as telephone companies, to keep as confidential the information they gather from their clients. However, there is an exception under subsection 6 to the effect that:

> (a) Nothing in this Act shall prevent a Judge in Chambers, upon an application, whether ex parte or otherwise, being made to him, by the Police, from making an order authorising a public operator, or any of its employees or agents, to intercept or withhold a message, or disclose to the police a message or any information relating to a message. (b) An order under paragraph (a) shall - (i) not be made unless the Judge is satisfied that the message or information relating to the message is material to any criminal proceedings, whether pending or contemplated, in Mauritius; (ii) remain valid for such period, not exceeding 60 days, as the Judge may determine;(iii) specify the place where the interception or withholding shall take place.

In *Ramen S v The State*,[137] the Supreme Court held that applications in terms of section 32 are "routine applications supported with a minimum of evidence which would justify a Judge's Order within the meaning of section 32 of the Information and Communication Technologies Act 2001, namely that such disclosure is 'material to any criminal proceedings, whether pending or contemplated in Mauritius'."[138] In *Police v Ramphul S K J and Anor*[139] the Court referred to section 32 of the Act and held that:

> [W]e have to bear in mind that under Section 32 of the Information and Communication Technologies Act (ICTA) an application is made ex parte or otherwise and an order shall not be made unless the Judge in Chambers is satisfied that information relating to a message is material to any criminal proceedings whether pending or contemplated in Mauritius.[140]

Section 32 gives the police the discretion to make an application *ex parte* or *inter partes*.[141] Failure by the police to invoke section 32 and obtain the necessary evidence may weaken the prosecution's case. For example, in *Police v Goodeeal*[142] the accused was prosecuted for using a telecommunication service for the purpose of causing annoyance and there was a dispute whether he had made the calls in question to the complainant. In acquitting the accused, the court held, *inter alia*, that "[n]o Judge's Order was sought so as to verify all the calls allegedly received by" the complainant,[143] the police officer "did not either verify from the cell phones

129 *Police v Ramjane Ahmad Nayaz* 2019 INT 70
130 *Police v R Ramcharan* 2016 INT 551, 3.
131 *Police v VA Gowry* 2013 INT 336.
132 *Police v Ramasawmy Brinda* 2016 INT 458, 8.
133 *Police v Nuckchadee P* 2012 INT 187.
134 *Police v Baboolall* 2017 INT 20; *Police v D Lokee* 2016 INT 290 (the accused alleged that his employee had used his phone to send out the annoying messages to the complainant).
135 *Police v A Noruthun* 2016 INT 75 (the accused made a confession that he had sent the offensive emails to the complainant).
136 For a discussion of the admissibility of illegally or unconstitutionally obtained evidence in Mauritius, see JD Mujuzi, 'The Admissibility of Evidence Obtained through Human Rights Violations in Mauritius' (2018) *South African Journal of Criminal Justice* 260–281.
137 *Ramen S v The State* 2013 SCJ 215.
138 *Ramen S v The State* 13. The applications under s 32 do not have to be related to offences under the Act. For example, in *State v St Pierre JS* 2018 SCJ 142, a case where the offender was prosecuted for drug-related offences, an application was made in terms of s 32.
139 *Police v Ramphul S K J and Anor* 2009 INT 305.
140 *Police v Ramphul S K J and Anor* 11.
141 *Police v Ramphul S and Anor* 2011 INT 163, 10.
142 *Police v Goodeeal* 2011 INT 256.
143 *Police v Goodeeal* 1.

involved or from the Telecommunication Department if there was any call exchanged between the phones of" the accused and the complainant,[144] and "the way the police enquiry was conducted" resulted in the prosecution's failure to prove the allegations against the accused beyond reasonable doubt.[145] A copy of the Judge's Order has to be adduced in evidence.[146] In *Police v Baboolall*[147] the accused was prosecuted for "using an information and communication service for the transmission of a message which is of an indecent character" and on the basis of a judge's order, the telephone company compiled a report on the accused's telephone number which was used as part of the prosecution's evidence to ensure the accused's conviction.[148] There are other cases in which the police obtained reports from the telephone companies on the basis of a judge's order.[149] However, section 32 is not applicable and a judge's order is not necessary in cases where the police did not intercept a person's call within the meaning of the Act.[150]

Employees of the relevant telephone companies, who are mostly IT experts, often come to court as state witnesses to confirm the names in which the phone numbers are registered and also to explain the technical details about the itemised billing.[151] Sometimes courts will require the prosecution to adduce documentary evidence from a telephone company confirming the ownership of the number in question and other relevant evidence such as the calls to and from given numbers and the date, time, and number of these calls.[152] Without a report from the telephone company, sometimes the police cannot prove that the accused is the owner of the sim card in question and the accused may be acquitted although the sim card and the phone in which it was used will be forfeited to the State.[153] In order to enable the police to get a judge's order, the complainant has to take his/her phone or computer to the police for the police's IT Unit to examine it and retrieve all the incriminating evidence against the accused.[154] In cases where officers of the police's IT Unit have retrieved the offensive messages from the complainant's phone and have positively identified the accused as the owner of the telephone number in question, they will not have to seek a judge's order. That evidence is sufficient to link the accused to the commission of the offence and to ultimately secure his conviction.[155] Failure by the complainant to take her phone for examination by the police's IT unit weakens the prosecution's case and could lead to the acquittal of the accused.[156] Likewise, the refusal by the accused to disclose his/her phone partner lock to the police makes it difficult for the police to access the content on his/her phone.[157]

144 *Police v Goodeeal* 1.
145 *Police v Goodeeal* 3.
146 *Police v Baboolall* 2017 INT 20 (in this case the police adduced a certified copy of the judge's order in evidence). See also *Police v D Lokee* 2016 INT 290, 1–2; *Police v Ramasawmy Brinda* 2016 INT 458, 5.
147 *Police v Baboolall* 2017 INT 20.
148 See also *Police v Lokye* 2013 INT 37, 1, in which the accused was prosecuted for using an information and telecommunication service for the transmission of a message which is of an obscene character and the court observed that "[t]he Prosecution called Mrs. [PR], representative of Mauritius Telecoms, who produced a report following Judge's Order … She stated that the report was as per request made by the Police."
149 *Police v Vinay Satyadhan Sujeeun* 2016 INT 528; *Police v Auckburally Abdool Motalib* 2008 INT 340 (judge's order was obtained to identify the subscriber of the mobile phone number who sent obscene facsimiles to the complainant); *Police v D Lokee* 2016 INT 290; *Police v Bungaroo Pratima* 2017 INT 86, 2; *Police v Jan Louis Antonio* 2017 INT 240, 3.
150 *State v St. Pierre JS* 2019 SCJ 340.
151 See *Police v JKC Mootialoo* 2016 INT 446, 2; *Police v Lenette JJ* 2007 INT 146, 2; *Police v R Ramcharan* 2016 INT 551, 2; *Police v Bungaroo Pratima* 2017 INT 86, 2; *Police v Ramasawmy Brinda* 2016 INT 458, 6.
152 *Police v Bungaroo Pratima* 2017 INT 86, 5; *Police v Jan Louis Antonio* 2017 INT 240; *Police v Soojhawon Suttianand* 2017 INT 380, 5.
153 *Police v Mohamad Ally Mamodally Junggee* 2012 INT 32.
154 *Police v Vinay Satyadhan Sujeeun* 2016 INT 528, 2; *Police v D Lokee* 2016 INT 290, 1; *Police v R Ramcharan* 2016 INT 551; *Police v J Seegum* 2015 INT 334 (the case was investigated by the police's cybercrimes unit).
155 *Police v NH Moussa* 2016 INT 38 (the accused was convicted of using telecommunications services for the purpose of causing annoyance to another person); *Police v Ghoorun Komalchandra* 2018 INT 77; *Police v Gyah Roshan* 2017 INT 132; *Police v Roussety Jean Fabrice* 2017 INT 131, p.3; *Police v Seepaul Nandeo* 2018 INT 79, 3; *Police v Ramasawmy* 2011 INT 241 (although in this case the accused was acquitted); *Police v Mohono Naiko Premila* 2020 INT 166 para 6.2.
156 *Police v NA Rujub* 2016 INT 477.
157 *Police v Mohono Naiko Premila* 2020 INT 166 para 10.2.

Failure to produce a report from the telephone company could be one of the reasons that a court may invoke to acquit the accused. For example, in *Police v V Joyram*[158] the accused was prosecuted for transmitting a message of a menacing character in that he used his mobile phone to call and threaten the complainant. The court, in acquitting the accused, agreed with the accused's submission that "the Prosecution had not produced any report as regards the examination of the phones."[159] Likewise, in *P v Narain*[160] the accused was prosecuted for using an information and communication service for the transmission of a message which is of a menacing character in that he made threatening calls to the complainant and the police did not adduce the itemised bills in court as evidence. This prompted the court to hold that:

> No itemized bill was produced, whether in relation to [the complainant's] or the Accused's respective phones, thereby leaving the Court in the dark as to the exact nature (text messages, phone calls, including the length of the phone calls) of the communication between [the complainant] and the Accused on the days in question.[161]

In acquitting the accused, the court held, *inter alia*, that:

> In light of all the evidence on Record…in particular given the testimony of [the complainant] … coupled with the lack of independent evidence in the form of IT Reports or itemized bills put before the Court in relation to the Accused's and [the complainant's] respective phones, and despite the Accused's admission he had called [the complainant] on the two material dates, the Court is of the considered view that there are real doubts which remain as to the precise circumstances of the present matter, and that the Prosecution has failed to prove beyond reasonable doubt the charges … against the Accused.[162]

The production of an itemised bill in evidence strengthens the prosecution's case hence increasing the chances of securing the accused's conviction.[163] However, if there is other evidence, such as a printout of the exact messages by the police's IT unit that the accused sent to the complainant and the complainant's oral testimony, the accused will be convicted even if there is no report from the telephone company or itemised telephone bill.[164] The challenge though is that if the accused sent many messages to the complainant, she might delete some of them if her phone's storage capacity is limited and the prosecution will have to rely on the few left messages to secure a conviction.[165] If the accused pleads guilty to the offence, he will also be convicted even if there are no itemised telephone bills.[166]

6 PENALTIES UNDER THE ACT

Section 47(1) of the Act provides that "[a]ny person who commits an offence under this Act, shall, on conviction, be liable to a fine not exceeding 1,000,000 rupees and to imprisonment for a term not exceeding 5 years." Section 47(2) of the Act provides for other penalties such as forfeiture, cancellation of a licence and suspension of a licence. There are two challenges posed by section 47(1). The first one relates to the sentence that a court may impose on a person convicted of an offence. The section is very clear that a person who is convicted of an offence is "liable to a fine not exceeding 1,000,000 rupees and to imprisonment for a term not exceeding 5 years." In other words, the court has to impose a fine, which does not exceed 1 million rupees and in addition to the fine, it also has to send the person to prison for a term not exceeding five years. Put differently, the court must impose both sentences on an offender.

158 *Police v V Joyram* 2017 INT 59.
159 *Police v V Joyram* 2017, 2.
160 *P v Narain* 2016 INT 482.
161 *P v Narain* 3.
162 *P v Narain* 4. See also *Police v Custnea Chandanee* 2006 INT 63, 2; *Police v Lenette JJ* 2007 INT 146, 3.
163 *Police v Sunil Dutt Tarachand* 2016 INT 251 (the prosecution produced the itemised bills in evidence and the accused was convicted of, *inter alia*, using an information and communication service for the purpose of causing annoyance). See also *Police v Bundhoo Karuna* 2017 INT 133, 2; *Police v Gyah Roshan* 2017 INT 132, 1; *Police v Ramasawmy Brinda* 2016 INT 458, 5.
164 *P v Bhagirath* 2016 INT 484; *Police v D Foolchand and Anor* 2014 INT 308; *Police v Mahadewoosingh Neemnarain* 2008 INT 469.
165 *Police v Nuckchadee P* 2012 INT 187 (the accused was convicted of using telecommunication services for the purpose of causing inconvenience to another person in that he sent text messages from his mobile phone number to the complainant's mobile phone number).
166 In *P v Carver & Another* 2018 INT 68 (the second accused pleaded guilty to the charges of using an information and communication service for the purpose of causing annoyance and using an information and communication service for the purpose of causing needless anxiety and was convicted accordingly).

If it is of the view that imprisonment is not an appropriate sentence, it has to motivate why it has not imposed a fine and imprisonment. This is so because the word "and" as opposed to "or" is used. If the court had a choice between imposing a fine and sentencing a person to imprisonment, the section would have provided that on conviction the person is "liable to a fine not exceeding 1,000,000 rupees or to imprisonment for a term not exceeding 5 years." Although section 47(1) requires a judicial officer to impose both a fine and imprisonment, in practice judicial officers have only imposed fines[167] or custodial sentences.[168] In *Police v Moonesamy*,[169] the accused, based on his guilty plea, was convicted of using an information and communication service for the transmission of a message which is of obscene character. The court observed that for this offence, the accused was "liable to a fine not exceeding one million rupees and to imprisonment for a term not exceeding 5 years."[170] In sentencing the accused, the court held that because of his personal circumstances:

> [A] non custodial sentence would be justified … A sentence under section 197 of the Criminal Procedure Act would nonetheless be too lenient in view of the age of the complainant and the actual harm caused but a custodial sentence would be markedly disproportionate when the facts of the case on record are considered as well as the mitigating features … I therefore fine Accused to pay 25,000 rupees.[171]

This means that in practice judicial officers are not following section 47(1) strictly. It is submitted that there is a need for section 47(1) to be amended and to replace "and" with "or" so that judicial officers could, without a challenge, choose between the two sentences.

Another challenge with the sentences provided for under section 47(1) is that they can only be imposed on natural persons although some of the offences under the Act can be committed by juristic persons such as companies. For example, section 46(m) provides that any person "without the prior approval of the Authority, imports any equipment capable of intercepting a message" commits an offence. It is also an offence for any person to establish, maintain or operate "a network or service without a licence or in breach of the terms or conditions of a licence."[172] Sections 24–27, read with Schedule one to the Act, are clear that the Information and Communication Technologies Authority is empowered to issue licences to both natural and juristic persons such as public operators and network licencees.[173] In fact, case law from Mauritius shows that the Information and Communication Technologies Authority has issued licences to private companies to provide internet and a voice telephony services,[174]

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167 For example, in *Bokhory D v The State* 2010 SCJ 421, the appellant was convicted of using a mobile phone for the transmission of a message of menacing character and the court imposed a fine of 10,000 rupees on him; *Komah M & Anor v State* 2012 SCJ 65; *Lokee D v The State* 2010 SCJ 378 (convicted of using a telecommunication service for the purpose of causing annoyance to another person, however, on appeal to the Supreme Court, the conviction and sentence were set aside because there was no evidence that the accused had sent the message to the complainant); *Sujeeun VS v The State* 2018 SCJ 165 (the accused was convicted of using an information and communication service for the purpose of causing inconvenience to a person "and sentenced to be conditionally discharged upon entering into recognizance in his own name in the sum of Rs 50,000 and furnishing a security of Rs 30,000 within 21 days and to be of good behaviour for a period of two years failing which to undergo six months imprisonment", 1; and his appeal to the Supreme Court was dismissed see 1). In *Tatiah v The State* 2010 SCJ 389, the appellant was convicted of using a telecommunication service for the transmission of a message of indecent character and on conviction was sentenced to pay a fine of Rs 10,000 and his appeal to the Supreme Court was dismissed); *Police v Mohono Naiko Premila* 2020 INT 166.

168 For example, in *Venkataredy D. v The State* 2021 SCJ 1 the offender was convicted under section 46(h)(iii) of posting content on his Facebook page which called for the demolition of a mosque and was sentenced to one month's imprisonment.

169 *Police v Moonesamy* 2014 INT 111.

170 *Police v Moonesamy* 1.

171 *Police v Moonesamy* 4.

172 Section 46(i).

173 In *Police v Gerard Choon Kat Wong Fung Can* 2015 INT 63, 1, "[t]he Accused is charged in respect of 2 Counts with whilst being unlicensed, establishing and operating an International Long Distance (IDL) service via internet to persons calling from telephone booths located at the same premises and the service was of the nature of a payphone and that the public was allowed to make calls against payment in breach of Sections 24(1) (2), 46(l) and 47 of the Information and Communication Technologies Act (ICTA)."

174 *Paging Services Ltd v ICTA* 2003 SCJ 154.

telecommunication services both local[175] and long international,[176] and to "establish, install, operate and maintain, on a non-exclusive basis an International Long Distance (ILD) Network for the supply of ILD service to the public, subject to the terms and conditions set out in the licence."[177]

Although the Act does not define the term "person", the Mauritian Interpretation and General Clauses Act[178] provides that " 'persons' and words applied to a person or individual shall apply to and include a group of persons, whether corporate or unincorporate."[179] In Mauritius, companies may and have been convicted of offences.[180] Since section 47(1) provides that a person convicted of an offence under the Act has to be sentenced to imprisonment and to a fine, it is argued that such a sentence is not applicable to juristic persons for the simple reason that a company cannot be sentenced to prison. In *Komah M & Anor v State*[181] in which the Intermediate Court convicted the appellants of, *inter alia*, using a telecommunication service for the purpose of causing annoyance to another person and imposed hefty fines on them, the Supreme Court, in reducing the fines, held that:

> It may well be that the learned magistrate was unduly influenced by the maximum fine of Rs1m which the penalty section envisages for such offences. However, it should be taken into account that the high penalty is to be reserved for commercial activities which constitute breaches of sections of such information and communication technology legislations.[182]

The above reasoning shows that companies may be convicted of offences under the Act. It has to be remembered that the other sentences under section 47(2) are not standalone sentences. They only come into play once a sentence has been imposed under section 47(1). This is so because section 47(2) provides that:

> The Court before which a person is convicted of an offence under this Act may, in addition to any penalty imposed pursuant to subsection (1), order - (a) the forfeiture of any installation or apparatus used in connection with the offence; (b) the cancellation of the licence held by the person convicted; (c) that the person convicted shall not be issued with a licence for such period as the Court thinks fit; (d) that a service provided to a person convicted of an offence under this Act shall be suspended for such period as the Court thinks fit.

Strictly interpreted, a person's licence cannot be cancelled under section 47(2)(b) unless he has been sentenced to prison, and also to pay a fine under section 47(1). In light of the above discussion, it is submitted that a company convicted of an offence under section 46 may end up not being punished under section 47 because the punishment provided for cannot be imposed on companies. It is recommended that there is a need to amend section 47(1) to give judicial officers the option of imprisoning the offender or imposing a fine or imposing both sentences depending on the nature of the offender and the seriousness of the offence.

175 *The Municipal Council of Port Louis v EMTEL Limited* 2011 PL3 92; *Dilmahomed MOR & Anor v EMTEL Ltd* 2013 SCJ 333; *EMTEL Limited v The Information and Communication Technologies Authority and Ors* 2011 SCJ 270; *EMTEL Limited v The Information and Communication Technologies Authority & Ors* 2009 SCJ 63; *EMTEL Ltd v The Information and Communication Technologies Authority & Ors* 2017 SCJ 294.

176 *Information and Communication Technologies Authority v Hot Link Co Ltd* 2014 SCJ 129; *Information and Telecommunication Technologies Authority v Hot Link Co Ltd & Ors* 2015 SCJ 154.

177 *Data Communication Ltd v Information and Communication Technologies Authority* 2016 SCJ 344.

178 Act 33 of 1974.

179 Section 2.

180 See for example, in *Police v Boskalis International bv and Anor* 2013 INT 288, a company was convicted of corruption.

181 *Komah M & Anor v State* 2012 SCJ 65.

182 *Komah M & Anor v State* para 8.

7 CONCLUSION

In this article the author has discussed case law to show how courts in Mauritius have dealt with some of the provisions of the Act. The above case law indicates that most of the offences have been committed using cellular phones through making calls, and sending messages (sms) or photos. It has been illustrated that some terms are not defined in the Act and courts have relied on dictionaries and jurisprudence from the UK to define them. Against that background, it has been recommended that the Act may have to be amended to define such terms or the Supreme Court will have to do so. It has also been illustrated that the punishments provided for under the Act can only, strictly speaking, be imposed on natural persons. The author recommends that the Act should be amended to address this shortcoming. This is especially in light of the fact that the Supreme Court has not found it necessary to refer some of the issues arising of out the application of the Act to the Judicial Committee of the Privy Council for clarification.[183] It has also been argued that some of the offences under the Act are of strict liability nature and that Mauritian courts do not have jurisdiction over offences under the Information and Communication Technologies Act when committed abroad.

183 In *Sujeeun VS v The State* 2019 SCJ 122, the Supreme Court did not find it necessary to refer the issues arising out of the Act to the Privy Council.