IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. M 60 of 1976

Coram: Parnell, Willkie and White, JJ.

BETWEEN	THE DIRECTOR OF PUBLIC PROSECUTIONS	APPLICANT
AND	THE GLEANER COMPANY	
AND	THE EDITOR OF THE SUNDAY GLEANER	RESPONDENTS

Henderson Downer and Shirley Lewis for the applicant;

Norman Hill, Q.C. and David Murray for the respondents.

February 21, 22, 24, 25)
May 30 and 31) 1977

July 6

Parnell, J.

This is a motion on behalf of the Director of Public Prosecutions praying for writs of attachment against the Gleaner Company Limited and against the Editor, Hector Wynter. The complaint is that in the Sunday Gleaner of July 18, 1976, an article was published under the caption "Sweet and Sour" and embodied in that article was an item headed "Witch-hunt." The publication of the item "Witch-hunt" was calculated - according to the applicant - to prejudice the fair trial of two men, namely, Allan Isaacs and Horace Hardy-Henry who were served on July 7 with summonses charging both of them with conspiracy to contravene the Official Secrets Act. The summonses were returnable for the Resident Magistrate's Court, Half-Way-Tree on September 2, 1976.

Content of item Witch hunt

Every item under the article "Sweet and Sour" has a heading. The relevant passage of eight lines in the article is as follows:

> Witch Hunt?
> "TO MY MIND, it is sad to see Messrs. Allan Isaacs and Hardy-Henry being served with summonses on charges for months old breaches of the outdated Official Secrets Act which even Britain (that invented it during wartime) is moving to revise. It savours a little bit of revenge and persecution. Who is our Matthew Hopkins, Witchfinfer-in-Chief?"

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The comment ends with a question being asked. No answer is suggested. The reader is left with something to ponder.

In the case of R. v. Duffy et al, ex parte Nash, [1960] 2 A.E.R. 891, contempt proceedings were brought against the writer and publisher of an article concerning an accused who had been convicted at the Central Criminal Court on a charge of causing grevious bodily harm with intent. The article was published the day after the conviction. Since the time for appealing had not yet expired, there was the likelihood of prejudicing the fair hearing of an appeal. When the contempt motion was heard, an application for appeal against conviction and sentence was pending.

In giving the judgment of the Court, Lord Parker, C.J. had this to say at page 894 H of the report above:

> "Accordingly, the question in every case is whether, in all the circumstances existing at the date of publication, including the content and form of the article, the circulation of the paper in which it appears, and the state of the proceedings, the article was intended or calculated to prejudice the fair hearing of the proceedings."

Since on the authorities and as a matter of good sense, the surrounding circumstances existing at the time of publication are to be considered by the Court, a brief reference to these circumstances will now be made.

Unfortunately, apart from the affidavit of the applicant who has referred to the alleged effect of the publication on the then pending criminal proceedings, no other evidence was put before us concerning the circumstances of the publication, the intention of Screwtape and the likely effect the publication could have had on the ordinary reader on the merits of the pending criminal proceedings. No affidavit has been filed by the respondents. But the Judges of the High Court do not operate from an Ivory Tower. They are required to follow the events in a rapidly changing Jamaica and they should not demonstrate ignorance of what is notorious.

Certain notorious facts

During the last quarter of 1975, a copy of a Ministry of Finance Cabinet Submission fell in the hands of the Leader of the Opposition. The document made reference to the economic plight of Jamaica. In a political broadcast the Leader of the Opposition quoted from the document. And the Daily Gleaner, (the first respondent) published the content of this confidential document.

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Shortly thereafter, the Ministry of Mining and Natural Resources was placed under suspicion as the likely source where the leak emanated. The Permanent Secretary was relieved of his duties and suspended from the public service pending investigation by the Police. Mr. Hardy-Henry was the Permanent Secretary of the Ministry at the time. Mr. Allan Isaacs was the Minister concerned.

In January, 1976, Isaacs was dismissed by the Prime Minister and within one week of his dismissal he resigned from the ruling political party but retained his seat as a member of the House. All these interesting and fast moving events aroused interest and discussion among the people. They were matters of great public concern. During this time, the Police with the help of Scotland Yard were probing and examining what relevant material they had with a view to their submitting to the applicant the result of their inquiries.

On the 7th July, 1976, criminal proceedings were launched against Isaacs and Hardy-Henry and as I have already mentioned, they were served with summonses commanding each of them to appear on September 2, 1976 before the Resident Magistrate. These in brief are the facts existing when "Screwtape" wrote his article and which the second respondent caused to be published on July 18.

When in 1892, the Secretary of State for the Colonies made a special reference for the consideration of the Judicial Committee of the Privy Council, one of the questions which had to be decided was whether a certain publication in the Nassau Guardian, criticising the conduct of the then Chief Justice of the Bahamas, amounted to a contempt of Court. One of the contentions of counsel, on behalf of the Chief Justice was:

> " that upon the issue whether a particular publication is a contempt, the judge is entitled to take into account the general state of the country and the surrounding facts which had come to his knowledge."
> (See [1893] A.C. 138 at 146.)

This reasoning which was not controverted by the committee is not far removed from that of Lord Parker in the case of Duffy to which I have already referred. Indeed, in a matter of this kind, a court or judge is required to do a balancing act. Two competing and equally important interests are involved, namely, the right of a free press to publish fair comments and the views of itself and of those of columnists and others on matters of public interest, and the right of a party to proceedings in court not to be prejudiced by newspaper comments

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before a case is heard and finally determined.

In a proper case, "the general state of the country" which the judge is required to weigh and take into account - as in this case - may cover several incidental and relevant matters occurring before or after the date of the publication of the alleged article which forms the basis of the alleged contempt.

Particulars of the criminal charge

The applicant has exhibited a copy of the information which was sworn to on July 7, 1976, by Detective Superintendent Herman Ricketts. The relevant portions are in these words:

> " On divers days between the 24th day of November, 1975 and the 8th day of December, 1975, Allan Issacs and Horace Hardy-Henry ..... at St. Andrew and within the jurisdiction of this Court conspired together and with certain persons unknown to contravene section 2(1)(a) of the Official Secrets Act, 1911, as amended by the First Schedule to the Official Secret Act, 1920, by communicating to other persons not being persons to whom it was in the interest of the state their duty to communicate it, the information contained in the confidential Cabinet Submission 544/MF-54 Budget Review 1975/76 and Financial Profile 1976/77 which the said Allan Isaacs and Horace Hardy-Henry had obtained owing to their position as.....Minister of Mining and Natural Resources and Permanent Secretary..... respectively."

Particulars of complaint by applicant

The applicant, in his affidavit dated October 22, 1976, makes the following points:

(1) when the summonses were issued on July 7, the first respondent on the following day carried a front page story under the headline:

> "Official Secrets Act - Summons on Allan Isaacs, Permanent Secretary also served."

(2) The Sunday Gleaner is widely circulated throughout Jamaica and that it has the greatest circulation of any Sunday paper printed and published in Jamaica.

The sting of the complaint of the applicant is put in paragraph 7 of his affidavit as follows:

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> " That in my opinion the publication of the said item in the Sunday Gleaner is calculated to prejudice the fair trial of the said case."

An interesting affidavit of Crown Counsel, Derrick Hugh, refers to the identity of "Matthew Hopkins" who is mentioned as the "Witchfinder-in-Chief" in the commentary. Mr. Hugh had to consult the reference library at the Institute of Jamaica, "to ascertain with certainty who Matthew Hopkins was. A photostat copy of the relevant page in the Dictionary of National Biography published in 1917 by Oxford University Press is exhibited. But it was not until the 3rd November - about 16 weeks after the publication - that he became certain as to the historical connection of the name. Perhaps if Mr. Hugh had done some research at the reference library at Tom Redcam Avenue, he would have found that a novel entitled Witchfinder General" by Ronald Bassett was published in England in 1966.

Lord Bacon, in his will which he executed about one year before he died, beseeched as follows:

> " For my name and memory I leave it to men's Charitable speeches, and to foreign nations and the next ages."
> (See Benham's Quotations 1965 reprint) 1262b.)

Matthew Hopkins lived in England during a period of arbitrary government, growing discontent, and religious fervour. He saw a little of the Civil War during the reign of Charles I and died about 2 years before Charles was beheaded. Hopkins was appointed Witchfinder General during the Civil War. It was a recognised and lawful appointment. His job was to supervise the searching, testing and "trial" of persons accused of witchcraft. Those who did not pass the test which Hopkins himself devised, were executed.

But Hopkins discharged his duties so conscientiously that he himself became a a suspect and being found "guilty" by his own test, i.e. floating while bound in water, was hanged.

The hunting, trial and execution of those who practised witchcraft during the days of Hopkins was believed to have had biblical approbation. Leviticus 20, verse 27 states:

> " A man also or woman that hath a familiar spirit, or that is a wizard, shall surely be put to death: they shall stone them with stones: their blood shall be upon them."

Unlike Bacon, Hopkins did not have to ask posterity not to be too hard with his name and occupation. With zeal he executed his duty and by over zealousness in its execution, he came to his end.

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The historical meaning of the word "witch-hunt" is discarded for a modern meaning when that word is used today. And in modern times, the word is used in the context of an investigation conducted with great publicity with a view to uncover alleged subversive political activity or disloyalty. It is said that many words have a historical connection and a modern interpretation. The Americans have their "buncombe" and their "gerrymander". And during the second world war, a "quisling" was discovered.

Certain dates and occurrences

Before I examine the legal arguments advanced over a period of 6 days I shall outline certain dates and events. A brief reference to the content and form of the challenged publication, will also be made. A copy of the Gleaner's story published December 8, will be used and quoted where necessary.

	Dates	Events
(1)	December 8, 1975	Leader of the Opposition made a political broadcast. Confidential Cabinet Submission is quoted. Economic state of the country referred to.
(2)	December 9, 1975	First respondent published the text of the broadcast.
(3)	December 10, 1975	First respondent published the content of the Cabinet Submission.
(4)	December 12, 1975	"At the request of the Police the Gleaner handed over to the Police the document that had been published"
(5)	December (after broadcast)	Permanent Secretary Hardy-Henry is suspended from duty.
(6)	January, 1976	Minister (Allan Isaacs) is dismissed. Resignation from ruling political party followed.
(7)	July 7,	Criminal proceedings started against Isaacs and Hardy-Henry. Summonses are served.
(8)	July 8,	First respondent published a front page story concerning the criminal proceedings.
(9)	July 18,	Commentary under item "witch-hunt" is published.
(10)	September 2,	Isaacs and Hardy-Henry appeared before Resident Magistrate. Case adjourned to September 23.
(11)	September 23,	Case adjourned to November 15 when trial is to begin.

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	Dates	Events
(12)	November 3,	The applicant, through Crown Counsel, Derrick Hugh, ascertained "with certainty" who Matthew Hopkins was.
(13)	November 15,	Trial started in the Resident Magistrate's Court.

It is to be observed that the forum of the trial, that is before a Resident Magistrate, was fixed on September 23. The applicant swore to his affidavit on October 22, one month after the fixture. And in fact, the trial was scheduled to begin 17 weeks after the publication of the commentary complained of.

Content and form

The content of the commentary "witch-hunt" has already been quoted. The Sunday Gleaner of July 18, 1976 (Section A) had 26 pages. The article "Sweet and Sour" by Screwtape appeared on page 25. There are eight sub-heads or items in the article. The item "witch-hunt" is third on the list. It follows two items, namely, "vile - and stupid!" and "Ridiculous says." And it is sandwiched between (1) a racing commentary on Rosemont white table wine and a request for a 25 cents olympic stamp under "ridiculous" and (2) a commentary on the Orange Street fire inquiry under item "Orange Street."

The last two items in the article deal with (1) the intrusion of politics in sport under item "no Gods on Olympus" and (2) women who are being discouraged from breastfeeding their children by certain advertisements under the item "passing comments." A quotation of Sir Winston Churchill with reference to "private enterprise" ends the article "Sweet and Sour." The impression is that the writer has taken a wide range of subjects - all matters of public interest - and has touched them in his own way. The eight items are handled with a mixture of wit, seriousness and literary extemporisation. In the pot-pourri, breastfeeding mothers have a place with gunmen whose activities and plight under the state of Emergency are mentioned.

It is clear that "Screwtape" has his style. There is a touch of satire in his commentaries. Like Pope he seems to be saying:

> " The things we know are neither rich nor rare,
> But wonder how the Devil they got there,
> Were others angry? I excused them too;
> Well might they rage. I gave them but their due."
>
> (Epistle to Arbuthnot, Satires and Imitations, lines 171-174).

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It could be -- I am not sure nor am I surprised - that owing to the setting of the commentary "witch-hunt"; the literary style of "Sweet and Sour", and the content of the commentary, the applicant has not said and it was not suggested by Mr. Henderson Downer, that there was an intention to prejudice a fair trial. The contention is that the commentary was, in all the circumstances, calculated to prejudice the trial of Allan Isaacs and Hardy-Henry. And the prejudice was aimed at the prosecution. That is the real point in this case. And to this point I shall direct my attention.

Legal Arguments

Several authorities were cited by Mr. Downer and Mr. Hill. The Court was almost buried under authorities. Mr. Hill borrowed some of Mr. Downer's authorities in order to demonstrate an opposite effect of the commentary. One particular case A.G. v. Times Newspaper was examined from its start before the Divisional Court until it reached the House of Lords. If I do not refer to all the authorities they cited, it is no reflection on their industry and tenacity. On the contrary, owing to their exertions any doubt which I may have entertained as I started the journey with them was early removed. Wisdom does not come to some people including writers, lawyers and public men. If it does come late in the day, however, it ought not to be rejected on account of its tardy emergence.

Mr. Downer's points

I hope that I am not doing any violence to Mr. Downer's arguments if I give a brief summary of them in my own words. He was questioned by members of the Court as he proceeded. Where necessary my summary will cover his answers to the questions asked. These are the main points he made.

(1) The test to be applied in the case is whether on a fair reading of the commentary there was a real risk of prejudicing the pending criminal proceedings against Isaacs and Hardy-Henry.

(2) The criminal charge preferred against Isaacs and Hardy-Henry could have been tried by a judge and jury (Circuit Court) or by a Resident Magistrate.

(3) The commentary was tilted against the prosecution and could have prejudiced the mind of the jury if the case was sent to the Circuit Court. There was also a real risk that potential witnesses who read the commentary may have stayed away not

because of fear but because of the persuasive effect of the commentary.

(4) At the time when the commentary was published, Britain was in the process of revising the 1911 Official Secrets Act which is in force here. The prosecuting authorities are criticised and the criticism is not fair and temperate. The whole tenor is calculated to prejudice a fair trial. In asking who is Matthew Hopkins, the witchfinder-in-chief, there is an oblique reference to the method of prosecution used by Hopkins in hunting witches.

The authorities relied on by Mr. Downer are not in conflict. They all illustrate the same principle, namely, that it is a contempt of Court to publish an article with the intention to prejudice the fair trial of a case or where it is calculated to have that effect. But to cite an authority is one thing. Whether the principle cited or propounded is applicable to the special facts under consideration is something quite different.

In R.v. Davies [1906] 1 K.B. 32; [1904-7] A.E.R. Rep. 60, the editor of a Welsh paper published comments concerning the then forthcoming trial of a woman charged with child abandonment and an attempt to murder the said child. The events were these:

September 1, 1905	Child found abandoned.
September 2,	An arrest is made for abandoning the child.
September 27,	Charge of attempted murder is laid.
October 11	Accused is committed to stand trial at the Assizes.
September 5,8,9,12	Respondent editor published articles in the local newspaper suggesting that the accused was guilty of "baby farming." Her "antecedents" were also published.

In R.v Evening Standard, ex parte Attorney General, [1954] 1 A.E.R. 1026, K was charged with murdering his wife. Before the examining justices, two women gave evidence that K had told them that he was unmarried. One of the women deponed that K had offered a marriage proposal to her. On the first day of the Assize trial, in the absence of the jury, the trial judge ruled that K's offer of marriage to the woman was not admissible. A reporter for an evening paper was not

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in Court when the judge made his ruling. He had left while the woman was giving her evidence to telephone his newspaper about the progress of the trial. In error, he caused the Evening Standard to publish the bit of evidence which was ruled out by the judge. K was later acquitted but nevertheless there was the likelihood that the inaccurate report, while the case was proceeding, could have prejudiced him.

There could be no question that on the facts in the two cases above, the publications in the press were calculated to prejudice a fair trial. In the second case an error was made by the reporter but the mischief nevertheless was done.

That a contempt of court is a criminal offence and is therefore regulated by the general principles applicable to criminal offences, is shown by Balogh v. St. Albans Crown Court /1974/, 3 W.L.R. 314. In that case, B, a solicitor's clerk devised a plan to enliven the proceedings at a criminal court which he was attending. He had studied some science at Oxford and he considered that his "knowledge" could be put to use in a criminal court where a trial had bored him. Nitrous Oxide (n_2o), gives an exhilirating effect when inhaled. As a result it is called "laughing gas". B got a half cylinder of the gas from a hospital park and put it in his brief case. His plan was to put the cylinder at the inlet to the ventilating system of the court and then the gas would be released in court. Counsel's row would get the full effect but others in the court would also be affected. B wanted to enliven the pornography court. One night he decided to examine the ventilating system while it was dark; he climbed on the roof of the court building and found the ventilating ducts. The connecting link of the cylinders was noted. On the following morning, B went to Court I (not the pornography court) with his brief case. He left his brief case and went out for a while. Having been observed the night before, his brief case came under suspicion. When it was examined his "instruments" were detected and his preparation at what he called a "practical joke" came to light. But Melford Stephenson J, who was presiding in Court I was far from being amused. The learned judge found that what B did was a "serious contempt of court" and imposed a sentence of six months imprisonment. But the Court of Appeal (Denning, M.R., Stephenson and Lawton, L.JJ) unanimously allowed the appeal and set aside the sentence on the simple ground that what B did was to make preparations to commit a contempt; he did not make any attempt to carry out what was in his head.

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And in giving his judgment Lawton L.J. put in felicitous language a view which several eminent judges had uttered over the years:

> " In my judgment this summary and draconian jurisdiction should only be used for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment."
> (See /1974/ 3 W.L.R. 314 at p.327 F)

About 81 years ago, Lord Russell, C.J. in Reg.v. Payne and Cooper, /1896/ 1 Q.B.577 at 581, had this to say:

> " I wish to express the view which I entertain that applications of this nature have in many cases gone too far. No doubt the power which the Court possesses in such cases is a salutary power, and it ought to be exercised in cases where there is a real contempt but only where there are serious grounds for its exercise.....the applicant must show that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending."

Where the facts show a clear intention to prejudice a fair trial, there is no difficulty. But where prejudice is to be inferred from the publication some difficulty may arise.

What does "calculated" mean?

It was Samuel Coleridge in one of his lectures on Shakespeare who complained of "the prevailing laxity in the use of terms." Coleridge died in 1834 but yet his complaint is still valid today. If the parson should say:

> "the christian religion was calculated for the bulk of mankind",

would the word "calculated" mean to plan or devise with forethought or arrange or adapted for a purpose? If a publication when examined leads one to the conclusion that it is likely - though not intended - to cause prejudice to a fair trial can the publication be said to "be calculated to bring out this result"?

In order to avoid confusion, judges have resorted to language and description in their anxious attempt to deal with the word "calculated" as used by Lord Russell in Payne's case. When the Times Newspaper case was before the Divisional Court, the Chief Justice (Lord Widgery), adopted the "test" laid

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down by two judges in recent years. This was done because as the Court said:

> "we do not intend to increase the confusion by adding yet another definition of our own." (See A.G. v. Times Newspapers, /1972/ 3 W.L.R. 855 at p.864 G.)

The test which was followed is stated thus:

(1) "The test must always be, in my judgment, whether or not in the circumstances of the particular case what has happened is something which is likely to prejudice the fair trial of the action, and the risk that it will prejudice the fair trial of the action must be a real risk."
per Buckley, J. in Vine Products Ltd. v. Green /1966/ Ch. 484 at 498.

(2) " I take the view that the law at present is that it does amount to a contempt if there is a publication which entails and involves a grave and substantial risk that the administration of justice will be interferred with "
per James J. in the unreported case of Church of Scientology of California v. Hurrell /1970/.

To these authorities I will add the views of Goddard, J. (as he then was) in Gaskell and Chambers Ltd. v. Hudson /1936/ 2 K.B. 595 at p.603:

> " The jurisdiction sought to be invoked in this case is a jurisdiction which it is very necessary that the Court should possess both for the vindication of its own authority and for the protection of the litigants who may come before it. On the other hand, it is a jurisdiction the exercise of which may deprive the subject of his liberty without the intervention of a jury..... It is therefore a jurisdiction to be used with circumspection, and only to be invoked for grave and serious reasons and on real and substantial grounds."

We in Jamaica have to deal with the United States in several respects. It is fitting, therefore, to look at the test which the Supreme Court has laid down in a matter of this kind. The test is that there must be a "clear and present danger" of interference. That test was first propounded by Holmes, J. in Abrams v. United States /1919/, 250 U.S. 616, 630.

Relying on the test laid down by Buckley and James JJ, the Divisional Court in the Times Newspaper case prohibited the intended publication of an article on the plight of children who were deformed. During pregnancy the mothers of the children had taken a certain drug. Civil proceedings had been taken out against a company as producers of the drug thalidomide. But a settlement had taken a long time to be concluded. The editor of the Times was concerned about the time lag and the unfair treatment of the litigants. A series of articles were published and the draft of another article was sent to the

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Attorney General informing him of the intention to publish it. The Attorney General sought an injunction to restrain the Times from publishing the article while proceedings were still pending. The article was critical of the Company and as a result of an independent investigation carried out, negligence was imputed to the defendant company. The Divisional Court granted an injunction against the Times Newspaper. The Court of Appeal reversed this decision but a unanimous House of Lords, reversed the Court of Appeal and restored the injunction. The law relating to the contempt of Court generally was closely examined by three separate courts and by experienced judges.

Mr. Downer has relied on the test of contempt as accepted by Lord Widgery in the Divisional Court and as explained in the several speeches in the House of Lords, in his contention that the commentary "witch-hunt" was calculated to interfere with the fair trial of Isaacs and Hardy-Henry. And for the purposes of testing his argument, I will assume that he is correct in saying that the charge as laid could have been dealt with either (a) as one for the Circuit Court or (b) as one fit for trial before a Resident Magistrate alone.

In either case, Mr. Downer contends that there could be prejudice to witnesses in that a potential witness having read the commentary there was the likelihood that the witnesses would not come forward. The weakness in this argument is that we have not been informed who the likely witnesses were on the date when the applicant swore to his affidavit. Yet by September 23, the applicant must have had an idea who they would be.

A prosecutor does not fix a date for the trial of a criminal case unless he is aware that his statements from his known witnesses indicate that there is evidence to put before the Court. Would an intelligent reader of Screwtape in the form of a potential witness on July 18, 1976 or shortly thereafter, be influenced by the commentary to the prejudice of the prosecution? If the answer is "yes - very likely" then who are they? Is it an Under-Secretary, Senior Civil Servant, Police Officer, Cabinet Official? What would sway or influence a "Jamai graduate" would not necessarily have the same effect on a wide-awake 'O' Level aspirant.

The proceedings before us is to be regarded as a criminal offence with all the incidents which flow when a person is on trial before a Court of competent jurisdiction. Facts have to be proved with clarity, proof must be beyond

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reasonable doubt; guess-work must be eschewed and inferences can only be drawn from proved facts. If two interpretations are open in construing a document or in analysing conduct, one of which is favourable to a defendant and the other against him, the unfavourable ought not to be drawn unless there is other evidence in the case which could reasonably cause a tribunal of fact to infer an unfavourable interpretation.

It must not be assumed that the minds of judges are likely to be pre-judiced by newspaper and other comments. A judge is trained to reject irrelevancies and to act on evidence alone. Where he sits with a jury, it is his duty to tell the jury that they should not be influenced by what they may have heard or read about the case then being tried. If Isaacs and Hardy-Henry had been committed to the Circuit Court, the trial would not necessarily have commenced before November 1976, when in fact it started before the Resident Magistrate. And that would have been at least 17 weeks after the publication of the article. Mr. Downer did not seriously contend that a Resident Magistrate would have been affected by the commentary if that Magistrate had read it before embarking on a trial. Indeed it would have been almost impossible for any argument to be adduced to satisfy me that unlike the position in other Commonwealth Countries, in Jamaica a Resident Magistrate trying a case is susceptible to newspaper comments or idle chatter in a periodical.

In the final analysis, the question here is whether there was any contempt at all. And if there was a contempt, whether it was sufficiently serious to warrant the summary and arbitrary power of the Court to make an order against the respondents. All the surrounding circumstances must be taken into account. Let me point out about two of them.

1. After the Leader of the Opposition made use of the Confidential Cabinet Submission on December 8, 1975, he set in motion public discussion and concern on the merits of keeping intact in Jamaica today, the restraint which the English Official Secrets Act of 1911 has imposed on those who have taken the oath of secrecy. There is nothing wrong for members of the public to urge peacefully in whatever ways they select that changes in the law are necessary. Jamaicans cannot properly influence the decisions which affect them unless they are adequately informed on facts and circumstances relevant to these discussions. And fact finding, investigation and discussion may have to be waged with the aid of the press. Where a public discussion is in progress, the dialogue does not come to

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a full stop, like a stop-watch, merely because legal proceedings are launched. That is the legal position in Australia and I adopt, with respect what was said in Ex parte Dawson /1961/ S.R. (N.S.W.) 573, 575:

> " The discussion of public affairs..... cannot be required to be suspended merely because the discussion.....may, as an incidental but not intended by product, cause some likelihood of prejudice at the time to be a litigant."

In his speech in the House of Lords in the Times Newspaper case, Lord Simon of Glaisdale is of the view that in a situation above mentioned, the law might strike a balance in favour of freedom of discussion. This is what he said:

> " There is one particular situation where the law might strike the balance between the competing interests either way, but in fact strikes it in favour of freedom of discussion. That is where a matter is already under public debate when litigation supervenes which the continuance of the debate might interfere with." (See /1973/ 3 W.L.R. 298 at p.328 E.)

If I am permitted to say so, I agree with respect with the reasoning of the Law Lord. A healthy public discussion could have been in progress when a "gagging" writ is filed by some official who is over-sensitive. His object may be to cut off debate and to lessen the heat directed at him and not necessarily to prevent prejudice to his pending case. He may not have a case.

When Screwtape, therefore, in his commentary questioned the relevance of retaining the "outdated Official Secrets Act, which even Britain (that invented it during wartime) is moving to revise", he was in effect posing the very question which public debate had already engendered. It did not require the services of a lawyer versed in the criminal law to inform the ordinary man that at least one of several persons who had taken the oath under the Official Secrets Act and who had access to the Cabinet Submission must have "leaked" the document to the Opposition.

2. The words:

> " It savours a little bit of revenge and persecution. Who is our Matthew Hopkins. Witchfinder-in-Chief?",

could have reference to the political directorate of the government. If the opposition arm is supplied with ammunition by one who claims to be a member of the executive arm, then the offender should be found and dealt with/during the investigation as much fanfare as possible will be in action. If this interpretation is open to the words above, - and in my view it is open - then certainly this would not be contempt of Court. It would be a proper use of the press to serve as a forum for the people and to demonstrate its freedom within permissible limits

I detect too much straining and imagination in the approach of Mr. Downer in dealing with the commentary. That is not the way the ordinary man approaches his Sunday paper when he is relaxing in his arm chair.

In the trial of defamation, if words are capable of two or more meanings, one of which is defamatory, they must be left to the jury. See Du Parcq,L.J. in Newstead v. London Express, 88 L.J. 314. Analogous to this is the position in a contempt proceeding case:

> " Where there are two equally consistent possibilities open to the Court, it is not right to hold that the offence is proved beyond reasonable doubt. Mr. Hamilton's conduct in telling lies was very reprehensible. But it is not sufficient ground for holding that he committed contempt of Court....." per Lord Denning, M.R. in re Bramblevale, /1969/ 3 W.L.R. 699 at p.705 D.

It should not be supposed that because the alleged newspaper commentary is tilted in favour of the defence, the Director of Public Prosecutions should not move the Court in a proper case with a view to punish the offender. Where the Director does come forward, however, he is in no better position than an ordinary applicant who complains that a newspaper article or commentary is calculated to prejudice his case. Whoever the applicant is, he must show good grounds that a serious risk of prejudicing a fair trial was or is likely or, as in the Times Newspaper case, that a serious risk to prejudice a fair trial would likely arise if publication of a certain article is not prohibited.

While Hawkins,J. was on circuit at Leicester Assizes and was engaged in trying a man charged with stealing eight pence worth of bacon, the Law Times in a front page commentary gave notice that it was going:

"to accumulate facts for the wonder of posterity."

And the Law Times gave certain facts.

A man had cut a piece of bacon from his employer's flitch. He was captured at 10 p.m. one night and compelled to travel for 3 hours in order to be locked up. He was then detained for 36 hours before he was taken before a magistrate. The committing magistrates sent their victim to gaol to await his trial before the Assize Judge. The editor branded the whole spectacle as "barbarous and absurd." See The Law Times of February 17, 1894. Perhaps this strong comment was "tilted" against the prosecution but my research does not show any move on behalf of the prosecution to put the editor before the Court.

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In 1946, there was a warm controversy in England as to the rights of journalists and newspaper proprietors to say and write what they please within the bounds prescribed by law relating to defamation, sedition, contempt of Court, blasphemy and obscenity. During the heat of the debate, a letter appeared in the Sunday Times of July 14. The writer's words caught the eye and approbation of the Editor of the Solicitor's Journal:

> " Publicity is the right of the public who are going to pay; it is an essential influence towards reason, compromise and justice on the part of the parties and their advocates, and great British judges have always been jealous for full publicity because like our liberties and the virtue, status and independence of the judicial process depend upon it. In the affairs of a democratic society secrecy is usually a matter of regret and always a matter for apology." (See 90 S.J. (Sat.July 20,1946.))

There is much food for thought in this robust letter.

Mr. Downer addressed the Court with vigour and a show of sincerity. Industry and ingenuity were displayed by him. But the more he argued the clearer it appeared to me what the decision should be. Mr. Hill in his usual persuasive style was of great assistance to the Court. He was frank enough to tell the Court the reasons why the respondents did not file an affidavit. It was on his advice that no material was put before us by the respondents. And he took a preliminary point, namely, that the alleged contempt was not properly pleaded. We rejected this contention. I think that the decision taken which resulted in the respondents refraining from filing an affidavit was unwise. They had nothing to lose and everything to gain. If the Gleaner thinks that in the exercise of the right of freedom of expression which is guaranteed by the Constitution, the article was published and that notwithstanding that criminal proceedings against Isaacs and Hardy-Henry had begun, no harm could be done by publishing Screwtape's commentary, then it should have said so. There was no need to remain silent. If it is claimed that on matters of public interest the Gleaner is accustomed to be sonorous and sturdy it should have shown the same courage and consistency in its own defence when hauled before the Court.

In my judgment, the applicant has failed to surmount the first hurdle, namely, to demonstrate that a contempt of Court was committed in the commentary "witch-hunt." It is not necessary, therefore, to consider the question what order, if any, would have been made in the circumstances if a case had been established. For these reasons, I am of opinion that this motion fails and

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should be dismissed with costs.

I shall give a brief summary of the reasons why, in my judgment, the motion has failed.

Summary of Reasons

1. The commentary "witch-hunt" is open to more than one interpretation. Where a case rests on one of two equally consistent interpretations one of which is innocent, then it is wrong to select the unfavourable interpretation as against the other.

2. Where as in this case a newspaper commentary forms the basis of contempt proceedings, then two competing interests are in issue, namely, the right of freedom of expression and the right of a litigant to a cause not to be prejudiced before his case is finally determined. In this competition, it is the duty of the Court to strike a fair balance.

3. Where public debate on a matter of public interest has started and litigation supervenes, the launching of proceedings does not necessarily put the debate to a full stop. If what takes place thereafter is used as a ground to support a motion for contempt, the Court will strike a balance with a leaning towards the right of freedom of expression.

4. The jurisdiction of the Court will be exercised when grave and serious reasons based on real and substantial grounds are shown. This presupposes that a case must first be made out.

5. Contempt of Court is a criminal offence. The burden of proof beyond a reasonable doubt rests on the applicant. And in this case, the applicant's case does not come anywhere near to the standard required.

Wilkie, J

I have had the opportunity of reading the judgment of my brother Parnell. I agree with his conclusion. If it were not for the importance which the case has generated I would have been content in adopting as my own all what he has said. I shall, therefore, add a few observations of my own.

The phrase contempt of Court is comprehensive enough to include not only disobedience to the orders of a Court but also to certain patterns of conduct, publications of material bearing on proceedings before the Court which tend to raise a real and substantial risk of prejudicing a fair trial. The decided cases are illustrative of circumstances brought to the notice of the Court which have been regarded by the Court as requiring condemnation. In the providance of good government in any community, assigned to the Court is the arbitrament of disputes between the citizen and the state; and between citizen and citizen. It is, therefore, of paramont concern that the authority of the Court be not threatened or abridged; that the rights of any citizen to come to the Court for relief be not interferred with; and any such conduct that may have these results will be suppressed by the Court under its power of contempt. In the exercise of its functions, the Court must always be cognisant of its duty to preserve and protect the free institutions of the nation within the law; and should refrain from imposing any limitations on the freedom of speech, criticism, debate and discussion beyond those which are absolutely necessary. It is in this light that the Court when reviewing matters with regard to any publication or speech or writing, consideration is given to a balancing of the public policy that these freedoms are maintained and at the same time to up-hold the public policy of ensuring that the authority of the Court is not undermined, i.e., that the rights of a party to any proceeding in Court be not prejudiced by publication of comments before the case is heard and and determined.

In his speech in A.G. v. Times Newspaper, [1973] WLR. 298 at 311 E, Lord Morris in speaking of Contempt said:

> "I doubt whether it is either desirable or possible to frame any exact or comprehensive definition or to formulate any precise classifications. Nevertheless the cases illustrate certain general principles as to what is or is not permissible and Courts have as a rule found no difficulty in deciding whether a complaint is or is not well founded. Certain examples may be given. Grossly irregular behaviour in Court could never be tolerated, nor could publications which would prejudice a fair trial".

It is with these precepts in view that the article complained of in this matter must be examined and considered in the light of the surrounding circumstances prevailing at the time of the publication. Proceedings for Contempt are criminal proceedings. The onus therefore, rests on the applicant and the standard is proof beyond reasonable doubt. Re Bramblevale [1969] 3WLR. 699 at p. 704. The only evidence put before us is that adduced by the Director of Public Prosecutions and his witnesses. The defendants adduced no evidence, as was their right, thereby putting the applicant to his proof. The history of this matter leading up to the publication of the article complained of and the surrounding circumstances at the time of publication have been trenchantly summarized by my learned brother Parnell J., in his judgment and I agree with his summary. The prevailing circumstances were highly political; the disputants being the Leader of the Opposition and the Peoples National Party on the one hand; and Mr. Allan Isaacs and the Peoples National Party on the other. The resulting disclosures and debate; sometimes accompanied by the greatest acrimony between the participants, engendered great public interest and discussion. Public interest had not abated during the subsequent investigations, suspension of Mr. Hardy-Henry, Permanent Secretary, from duty, the dismissal of Mr. Isaacs as Minister, and his subsequent resignation from the Peoples National Party: and finally to Mr. Hardy-Henry and Mr. Allan Isaacs being charged for breach of the Official Secrets Act.

The publication, it is complained, related to this prosecution. Mr. Downer submitted that the article was calculated to prejudice the

fair trial of the said case in that the article expressed sadness that Messrs. Isaacs and Hardy-Henry were charged and that it savoured if revenge and persecution. That the article inferred that the prosecution is a 'witch-hunt' and suggested that the Director of Public Prosecutions conduct is similar to that of Matthew Hopkins, a witch-finder. That all this was intended or likely to influence the minds of the Judge who would preside, potential jurors as the case could proceed either before the Resident Magistrate or in the Circuit Court and potential witnesses, who might, as a consequence, refuse to come forward to testify with the resultant prejudice to the prosecution.

This was Mr. Downer's interpretation of the article which was put in evidence and upon which he relied in proof of the charge.
Mr. Hill challenged this interpretation. The substance of his submission is that the article was open to a completely different interpretation from that put forward by Mr. Downer. That it had nothing to do with the charge or the prosecution or the Director of Public Prosecutions; that it was a legitimate comment on the desirability of maintaining an imperial statute in all its form when the British Parliament which gave it its birth was itself questioning the efficacy of the legislation and changes had been recommended. That the reference to witch-finder-in-chief canbe related to the Director of Public Prosecutions only by an unnatural and strained interpretation. That the article legitimately seeks to stimulate further discussion as to whether the Official Secrets Act should be maintained in its present form or at all, in the light of the modern imperatives of a citizen's right to know what its Government is doing and how the affairs of the hation is being administered. That in construing the publication it must be read as a whole. No part should be taken in complete isolation in an attempt made to interpret it. Mr. Hill submitted that on a fair interpretation the articles intendment was a criticism of the political directorate and not of the judicial process and consequently the article cannot be the subject of contempt.

I have read the article giving due consideration to the surrounding circumstances. It is observed that the article does not say the law has not been breached. It specifically states "being served with summons on charges for months-old breaches of the out-dated Official Secrets Act". Reference was made to Matthew Hopkins. Who, then, was Matthew Hopkins? His biography was exhibited to Mr. Derrick Hugh's affidavit. Matthew Hopkins was a religious zealot of the Cromwellian period of English history. His career was that of a witch-seeker, who journeyed throughout the country discovering, testing and trying witches. This was a lawful occupation under then existing laws. It was a period of great religious intolerance and savagery. The whole method of witch-finding is described in the exhibit as follows:

> "the date indicate that this was one of the baser forms of religious excitement which broke bounds with with the civil war."

Could the historical circumstances of the 17th Century, Matthew Hopkins a religious zealot; and a time described as a period of religious excitement, he translated into contemporary Jamaican terms to be that of a period of 'political excitements' and 'political zealots' seeking to find, not witches, but political dissidents as contended by Mr. Hill? Does the reference to Matthew Hopkins, definitively spells out to whom the article was referring, i.e. the political directorate as distinct from the judicial process by which these persons were to be tried and their case determined? Mr. Hill submits that the article is open to such an interpretation. I find merit in Mr. Hill's submissions and hold that the article could be so interpreted. The case, therefore, rests on two equally consistent interpretations one supporting the complaint and the other supporting innocence.

The onus is on the applicant to discharge the burden of proof and this he has failed to do. The duty of the court is clear in such an event. The public interest in freedom of discussion, of which freedom of the press is one aspect, must be preserved and protected by the Court. Such freedom will be circumscribed by only the presentment o

clear and unequivocal evidence of conduct or publication which tend to prejudice a fair trial. Those conditions are manifestly non-existing in this case. I would, therefore, hold that the motion fails and should be dismissed with costs.

WHITE, J

I also have come to the conclusion that a Writ of attachment for contempt should not issue against the "Daily Gleaner" newspaper and Hector Wynter, the editor of that newspaper for contempt in respect of the comment entitled "Witch Hunt?" which appeared in the column headed "Sweet and Sour" published in the Sunday Gleaner dated July 18, 1976.

> "The law on the subject must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice, and it should in my judgment, be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary, but it cannot be allowed where there would be real prejudice to the administration of justice". Per Lord Reid in A.G. v. Times Newspaper /1974/ A.C. at p. 294.

The article Witch Hunt? "which has been the subject of this enquiry must be examined and analysed in the light of those words and especially 'whether in all the circumstances existing at the date of publication, including the content and form of the article, the circulation of the paper in which it appears, and the state of the proceedings;' the article was intended or calculated to prejudice a fair hearing of the proceedings". Per Lord Parker CJ in R.v. Duffy /1960/2 AER 891 at 894.

Mr. Downer for the applicant, the Director of Public Prosecutions submitted that the form and content of the article entitled "Witch Hunt?" published while there were pending proceedings against Alan Isaacs, a former Minister of Government, and Horace Hardy-Henry, the Permanent Secretary had the effect that there was a real risk that a fair trial would be prejudiced. He further contended that/the risk that a fair trial would be prejudiced was established because - (a) there was a high probability that there would be a jury trial, and

potential jurors would be influenced against the prosecution; and (b) there was a likelihood that those potential witnesses would either not come forward or if they did they would be prejudiced against the prosecutor. Accordingly the offence being one of strict liability, not withstanding that the Court must look at the article and the surrounding circumstances at the time of publication, and if the article as a whole is calculated to influence the prosecution, potential witnesses, potential jurors and even the Resident Magistrate, contempt is proven.

The major thrust of Mr. Downer's argument was that the prosecutor, the Director of Public Prosecutions, was being unfairly dealt with in the offending article. The writer of the article, it was contended was denigrating the system of prosecution as it is in Jamaica.

The question "Who is our Matthew Hopkins, Witchfinder-in Chief" was an accusation that the prosecution was acting in a high-handed manner which smacked of persecution and revenge and was not brought to fulfil the role of a Minister of Justice. At the same time, Mr. Downer conceded that a writer has the right to criticise the performance of a public duty, but where there are pending proceedings the writer must be fair and temperate, which means that he must not use language calculated to prejudice a fair trial.

When he delivered his judgment in the case of A.G. v. Times Newspaper Ltd. /1973/1 QB 710 at p. 722 C to p. 723B, Lord Widgery CJ. discussed the three principal ways in which uni ateral comment may prevent the due and impartial administration of judtice. I do not propose to quote in extenso the particular passage, Suffice it to say that the categorisation is the same as Mr. Downer's in his submissions before this Court. However, it must be noted that Lord Widgery, CJ. was careful to set out the sort of comment which would be considered likely to affect a professional judge. "This comment must be so strong as to amount to a threat to the judge that if he does not follow the argument put forward he may be severely criticised, if not pilloried, subsequently."

A further useful pointer to the standing of the judge in this matter is found in the remarks of Lord Parker CJ. in R. v. Duffy /1960/ 2 AER at page 894. He is there dealing with when improper matter published during pending proceedings might constitute a contempt of Court.

> "This might well occur if, for instance, the article in question formed part of a deliberate campaign to influence the decision of the appellate tribunal".

He later added -

> "Even if a judge who eventually sat on the appeal had seen the article in question and had remembered its contents, it is inconceivable that he would be influenced consciously or unconsciously by it. A judge is in a very different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case. This indeed happens daily to judges on assize. This is all the more so in the case of a member of the Court of Criminal Appeal, who in regard to an appeal against conviction is dealing almost entirely with points of law and who in the case of an appeal against conviction is considering whether or not the sentence is correct in principle".

Those views can, I think appropriately be applied to the role of the Resident Magistrate, as well as to a single trial judge in the Supreme Court in Jamaica. And it is not a strained reaction to apply them to the position of the Director of Public Prosecutions, who is independent in the performance of his constitutional functions. Although no one may hold that office unless he is qualified for appointment as a Judge of the Supreme Court, it does not necessarily follow that every comment on the performance of his functions and responsibilities will hold him up to public obloquy.

This is not to say that I accept that the article "Witch Hunt?" refers to or can reasonably be read as referring to the Director of Public Prosecutions. Indeed, any initial trend of thought along that line was erased by the pains-taking and persuasive arguments by Mr. Hill, who appeared for the Respondents.

It was his strong contention that the article does not refer to the Director of Public Prosecutions. There was no evidence anticipatory of his argument; nothing at all to counter vail the argument, and this even if the learned Director had set out in his affidavit that this was his understanding of the article when reasonably interpreted. In passing, I refer to Mr. Hill's argument that the investigations were apparently started without the previous instructions of the Director of Public Prosecutions. He said it appeared that the Director of Public Prosecutions was brought in after investigations were completed. One has to be reminded that the Director of Public Prosecutions has the power not only to institute and undertake criminal proceedings but to take over and continue any such criminal proceedings that may have been instituted by any other person. So that in any appropriate set of circumstances it may very well be important to consider whether the taking over and continuing by the Director of Public Prosecutions had invited unilateral comment of the nature we are considering.

In the present case, of course, this factor to my mind is not important, and further comment is not pursued. In the instant case on my reading of the offending article his freedom of action was in no way sought to be affected.

It is only left to say that I accept the argument by Mr. Hill that the applicant has not proven the contempt beyond a reasonable doubt, this failure has been compounded by the fact that an analysis of the surrounding circumstances indicate a public debate on a political issue one aspect of which was the invoking of an outdated imperial act. Mr. Hill is right that no where does the article refer to the merits of the case.

Nor in no way can this be said to be an extreme case where the comment might amount to a threat to, or dissuasion of, a witness, sufficient to deter him from giving evidence.

Putting myself in the position of a jury, I am of the view that it has not been proven at all that the offending article was intended to prejudice a fair trial nor were the words of the article, in my view, calculated to prejudice a fair trial.

I would like at the end of this judgment to pay tribute to the attorneys-at-law who argued this question. I certainly found the arguments most helpful and enlightening.

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