IN THE SUPREME COURT OF JUDICATIRE

IN COMMON LAW

SUIT NO. C.L. 025/1976

BETWEEN	THE GLEANER COMPANY LTD.	PLAINTIFF
AND	JAMAICA BROADCASTING CORPORATION	
AND	JOHN MAXWELL	DEFENDANTS

Ronald Williams Q.C. (with him Leo Rhynie Q.C.) for Plaintiff

Muirhead Q.C. (with him Shelton) for first-named Defendant

Knight (with him Pickersgill) for second-named Defendant.

HEARD ON: Divers days in January, 1980, November, 1981 and March, 1982.

JUDGMENT

VANDERPUMP, J

The words complained of were used by second-named Defendant in a rambling discourse over first-named Defendant's radio on the afternoon of the 14th January, 1976. This ranged from the buying potential of money (that could only buy a coup), touched on the democratic process and what was happening in Chile, stressed the need to be alert and protect ourselves here. It then went on to mention that morning's issue of the Plaintiff's newspaper, describing one of its headlines in choice language, and had it's high point in the assertion that Plaintiff was thereby involved in a conspiracy to destroy the Constitution of the country. To round it off second-named Defendant invited Plaintiff to sue him for libel! This has now come to pass. And as it is in respect of a libel calculated to injure its reputation in the way of its business it lies without proof of special damage. South Hetton Coal etc. v North Eastern News etc. 1894 1QB 133,138,141; Court of Appeal. D & L Caterers Ltd v D'Anjou 1945 1A.E.R. p.563, 564G,565A, 566. G885,n.16, G153.

The Pleadings

Plaintiff contended that these words in their natural and ordinary meaning meant:-

5(a) That the Plaintiff had been guilty of a most disgraceful piece of lying journalism in their reporting of the establishment by the People's National Party of self-defence groups.

of S/C

5(b) That the Plaintiff was involved in trying to confuse a lot of people.

5(e) That the Plaintiff was a company which deliberately misrepresented the true facts in publishing the news contained in its publications. This one was an inference from the other two above which two along with 5(c) are ipsissima verba.

5(c) Reads that the Plaintiff was involved in a conspiracy to destroy the Constitution of Jamaica.

Paragraphs 2, 3 & 4 of the Defence admitted these allegations and said they were true in substance and in fact and the particulars on which second-named Defendant intended to rely to justify that, were as to 5(a), (b) and (e) set out in paragraphs 2(a) to 2(e) of the Defence and in addition for 5(e) exhibit 2 (?) which exhibit alone was depended on to Justify 5(c). These were excerpts from Daily Gleaners of different dates.

Paragraph 5 of the Defence, in the alternative, set up fair comment on a matter of public interest relying once more on the same particulars! I hold the first three reasonably capable of being regarded as comments, the last, 5(c) as an allegation of fact.

So far the defence is Justification or fair comment on a matter of public interest. An unsuccessful attempt was

made at the trial on the second day of the continuation to amend paragraph 6 of the Defence to add as an alternative, Justification for 5(d) & 5(f). These read:-

5(d) That the Plaintiff was not a company of integrity, also reasonably capable of being regarded as comment.

5(f) That the Plaintiff company was guilty of the criminal offence of conspiracy.

Followed by 6 that the Plaintiff was guilty of the criminal offence of Treason Felony and/or Sedition. 5(d) seems to be an inference drawn from 5(a) and (b). Whilst both 5(f) and 6 are based on interpretations of the words in 5(c).

The defence here is different. Dealing with 5(d) & (f), paragraph 6 says first of all that the said words do not mean and were not understood to mean what is alleged, the said words without the said allegations are no libel, the said words are incapable of the said allegations or any other libellous meaning, words not libellous in themselves; insufficient in law to sustain the action.

Dealing with paragraph 6, paragraph 7 simply says words did not mean that and the words without the allegations are not libellous.

Paragraph 1 of the defence admits paragraph 4 of the Statement of Claim, inter alia, that the words were falsely and maliciously published. In the state of the pleadings this is an obvious error.

Are these admitted allegations defamatory?

" Any defamatory imputation upon the Plaintiff's character or conduct conveyed by the words was, mainly at any rate, dependent upon inferences which the (listeners) would themselves draw from them. The Plaintiff, as he was entitled to do, chose to set out in its Statement of Claim the particular defamatory meanings which it contended was the

" natural and ordinary meaning of the words."

.... As I am sitting alone without a jury, the only questions I have to ask myself are:

> " Is the natural and ordinary meaning of the words that which is alleged.........?" and
>
> " If not, what, if any, less injurious meaning do they bear?"

Slim v Daily Telegraph Ltd 1968 2QB 157, 175 DE, 176D.

> I "must put (myself) in the place of a reasonable fair-minded person to see whether these words suggest disparagement, that is, would injure the Plaintiff's reputation or would tend to make people think the worse of him"

Carey, J.A. - Gleaner v Small SCCA 65/79 p.55.

The allegations contained in 5(a) & 5(b) are clearly defamatory as they would certainly injure Plaintiff's reputation as a reliable newspaper and make people think the worse of it. I so hold. 5(e) is an inference open to the listener to draw from the words in the first two allegations. A reasonable inference which is defamatory as tending to lower Plaintiff in the estimation of right-thinking members of society generally, make them think the worse of it. I so hold also.

Likewise 5(d) a reasonable inference that could be drawn from 5(a) & 5(b) by the reasonable listener, are clearly defamatory for the same reasons. If Fair Comment succeeds on 5(a) (b) & (e) then as 5(d) is likewise a comment I will not hold it against Defendant.

5(c) is also defamatory.

The Evidence

Half way through this discourse second-named Defendant says:-

> ".... my feeling is that if we are alert and realise that we have duties as citizens ..... to protect ourselves, to protect our constitution, to protect our country ..... well I think that a lot of us are more alert than people think.... like the Gleaner for

"instance who in the most disgraceful piece of lying journalism I have seen for a long time this morning has a headline saying - FORCE NEEDED JOURNALISTS TOLD: FORCE NEEDED TO DEFEND P.N.P. HEADQUARTERS OF P.N.P. GROUPS .... and it prints a release from the Agency of Public Information which talks about a news briefing yesterday ...... at Jamaica House. There is not one word in it that mentions force.... it talks about people, watchmen, a watching security service. The Gleaner said it was going to be a force whether the P.N.P. wanted a force or not, the Gleaner is going to make it a force.... Well there are a lot of people - they are trying to confuse a lot of people and the Gleaner is involved in it...... I would welcome them to sue me for libel ..... I would welcome them to sue me for libel, they are involved in what I consider to be a conspiracy to destroy the Constitution of this country....... I welcome them to sue me..... well,well that now that means ...... I'm saying something else now ...... yes they sued me already ..... I didn't have to shut up ...."

Here the commentator on Public Eye is dealing with the way in which the Plaintiff's newspaper reports a simple briefing at Jamaica House the day before at which he was present. He refers to the headline and the text beneath it and finds a difference. Indeed there is a difference at first glance - force in the headline is not repeated! Therefore he concludes the headline is a most disgraceful piece of lying journalism, it is confusing, and deliberately misrepresenting the true facts! The subject is this newspaper and the comment is on the way it reports news - in a lying and confusing fashion. By use of the word 'force' it has projected itself to the extent that there was going to be a force whether the P.N.P. wanted a force or not! The Gleaner was going to make it a force. This was a deliberate misrepresentation of the true facts appearing in the text itself which mentioned people, watchmen, a watching security service. The Prime Minister had not used the word force nor the

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phrase defence force at any time Defendant said in the box. Indeed Mr. Manley had emphasised that it was not a matter of force at all!

All the facts on which these comments were based were faithfully reproduced in exhibit 1. They were truly stated. They were truly stated because the word in single quote in the headline had a special meaning, it was a synonym for group (although perhaps not readily apparent). A closer reading would have revealed this to Defendant. This headline was certainly not self-explanatory. That is why it is not repeated in the text (except for police force). Mr. Neita had said in evidence that the single quote meant that the word force was not being used in the ordinary sense but in the sense of a group. Webster's New Century Dictionary meaning number 8. Fowler, the King's English, third edition page 290 'cat' nine tails (an instrument of punishment), cat one tail.

> " ..... if the Defendant accurately states what one public man has really done (here Plaintiff publishing an A.F.I. release) and then asserts that 'such conduct is disgraceful' (manner of publishing) this is merely the expression of his opinion, his comment on the Plaintiff's conduct (on the manner of publishing involving lying journalism). So, (also) if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case the Defendant enables his readers to judge for themselves how far his opinion is well founded; and therefore, what would otherwise have been an allegation of fact becomes a comment."

Words in brackets mine.

.... Odgers on Libel and Slander (5th ed.) p.203 cited with approval by the House of Lords in Kemsley v Foot 1952 1A.E.R. p.501, 505. In that case the particulars of the specific facts on which the said words were a fair comment were delivered separately and consisted (as here) of excerpts from the appellant's newspaper along with certain allegations and complaints (not here). One of these here was an excerpt of even date

appearing in or rather starting on the same page containing exhibit 1. In it the then Leader of the Opposition called on the nation to bar the P.N.P.'s defence force set up and went on to give as his opinion that in effect it was not a genuine unarmed group, likening it to a People's Militia. Exhibit 8. In right hand column of that page. Both exhibits dealt with the same subject matter. In the box Defendant said force in the context of exhibit 1 and in the context of the fierce debate (heard mention of it over radio) then going on about violence and it's causes could only mean force of arms, might, strength, violence, power. On the same page the word force appeared not in quotation marks in exhibit 8 (in all twelve times!). He had never seen a defence group referred to as a force in any instance.

> " Twenty facts might be given in the particulars and only one justified, yet if that one fact was sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the respondent's plea" -

Page 506D ibid.

To be fair they must be comments which a fair man may reasonably make. Burton v Board 1928 All E.R. Rep. 659, 660I.

Where the defence is fair comment the burden is on the Defendant to show that the facts are true and that the comment is objectively fair, i.e. such as an ordinary reasonable man might make. The juxtaposition of 'force' exhibit 1 and force exhibit 8 is of note. I hold this burden discharged. Then open to the Plaintiff to prove that the Defendant made the comment maliciously; for example from a motive of spite or ill-will or any improper motive. For it to prove that the comments subjectively considered were unfair because the writer was actuated by malice. Adams v Sunday Pictorial 1951 1A.E.R. 865, 868A Denning L.J. This on the balance of probability. Paragraph 146 Hals 4th ed. Vol 28. Was second-named Defendant's sole or dominant motive in publishing these words due to some ill-will towards Plaintiff

or some other improper motive? Paragraph 149n9 ib.

It is for the Plaintiff to give particulars of facts and matters from which malice is to be inferred - 146 sup.

If Plaintiff is relying on malice to cause a comment otherwise fair to become unfair then he must prove malice against each person whom he charges with it. Egger v Chelmsford 1964 3 A.E.R. p.406, 412H & I. A Defendant is only affected by express malice if he himself was actuated by it or if his servant or agent concerned in the publication was actuated by malice in the course of his employment. Express malice is a term of art...... means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which Plainsets out to prove. Horrocks v Lowe 1974 1 A.E.R. 662, 669D.

The Statement of Claim makes one reference to malice. Paragraph 8 mentions malevolence or spite. There are particulars.

i) Previous history of libel of Plaintiff by second-named Defendant to which is linked (iv) News Analysis on two separate occasions previously. These were not opened to nor persisted in (apart from exhibit 4)

ii) Second-named Defendant's words, "I would welcome them to sue me for libel."

iii) Second-named Defendant's interview with Daily News exhibit 12 inter alia he had no intention of apologizing.

Refusal to apologise is at best but tenuous evidence of malice for it is consistent with a continuing belief in the truth of what he said. Horrocks v Lowe sup. 671D

Reply at paragraph 3 alleges express malice and again we have particulars:

3) Was similar to 8(iii) of the Statement of Claim the lack of apology with the addition of no retraction or correction by him.

4) Was similar to 8(ii) "I would welcome them to sue me for libel" but it made reference to all the words and those in particular.

2) Referred to exhibit 3 apology of first-named Defendant (?).

5) Repeated 8(i), (iv), and (iii) of the Statement of Claim.

7) Relied on contents of affidavit by second-named Defendant on 1st March, 1977.

1) Set up that second-named Defendant had no honest belief in the truth of the said words.

In his opening Mr. Leo Rhynie for Plaintiff had referred to paragraphs 770 & 772 of Gatley 7th ed. which were to the effect that whilst the best way of establishing malice was to prove that the Defendant made the statements in full knowledge of their falsity, it could nevertheless be established by other means such as recklessness or indifference as to whether true or false and submitted that the combination of the gravity of the allegations made and the nature and quality of the facts pleaded in support would compel the court to find that statements made without an honest belief on the part of second-named Defendant. That which was recklessly defamatory could hardly be deemed fair comment.772G. I do not view that as a reasonable inference to draw and I refrain from so doing.

Even if all these words were too strong that does not say that malice must be thereby implied. Neville v Fine Arts 1895 2QB 156, 172. Overzealous though he may perhaps have been for the interest and well being of the Government that would not

be evidence of malice. Page 173 ib.

That first-named Defendant apologized and second-named Defendant did not so do I would not hold as malice - same for the fact that second-named Defendant /did not retract nor correct. That second-named Defendant welcomed a suit for libel could mean that he was overconfident in its outcome in his favour and nothing more.

There was nothing in Neita's evidence to prove malice. No material from which I can infer it on Plaintiff's side.

Exhibit 4 is an isolated case - it does not prove a "long practice of libelling this Plaintiff...." page 5 thereof. I do not take that into account.

So I am left -

> " with no other material on which to found an inference of malice except the contents of the (broadcast) itself, the circumstances in which it was made and of course (Defendant's) own evidence in the witness box...... the test of malice .... has it been proved that the Defendant did not honestly believe that what he said was true i.e. was he either aware that it was not true or indifferent to it's truth or falsity?"

Page 671E of Horrocks v Lowe sup.

Before their publication second-named Defendant knew of the contents of exhibits 1 & 8. In the box he said:-

> " As I understand it the question was that the P.N.P. whose group meetings were held in private houses for the most part thought that they needed to organise some system to protect their people and people's property. On the other hand, Mr. Seaga - Leader of the Opposition then, was saying that it was an excuse to unleash a communist militia in Jamaica. That was the background to my state of mind."

Apparently he though that the single quote was meant to indicate a quotation from the text. That would not be unreasonable on the face of it only, with exhibit 8 in close proximity to it. Then 'force' would mean force in the ordinary sense. [illegible]

[illegible]

He continues:-

> " I thought exhibit 1 to be an attempt to frustrate the bringing to bear of informed public opinion on a matter of National Interest that is why I said it was a most disgraceful piece of lying journalism..... exhibit 1 upset all my ideas of journalism, made me extremely angry and provoked me, provoked my response "

As an educated journalist of some thirty years standing he should have known that the single quote could indicate also a special meaning and not the ordinary sense, but he said that was quite ridiculous, never heard of it! He did however admit hearing Mr. Neita say so.

He seems to have been honestly expressing his real view and I cannot visit him with malice in the sense referred to in the cited case. Paragraph 3(1) of Reply.

So that Plaintiff has not proven malice in second-named Defendant at the material time I find.

That it is a matter of public interest is not disputed and I so hold as a matter of law (228H).

> " The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations, no matter that his opinion was wrong or exaggerated or prejudiced, no matter that it was badly expressed so that other people read all sorts of innuendoes into it, nevertheless he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this he has nothing to fear even though other people may read more into it."

Slim v Daily Telegraph supra, 170BC Lord Denning M.R.

I hold these to be comments and as such were honest expressions of second-named Defendant prejudiced though he might have been and I so find. The defence of fair comment succeeds on 5(a),(b) and (e).

After these comments comes the grand finale -

> " They are involved in what I consider to be a conspiracy to destroy the constitution of this country... well... that means ..... I am saying <u>something else now</u> ......"

> " ...... the writer must be careful to state the inference as an inference and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact."

Kemsley v Foot p505 supra: Maxwell here was introducing a new and independent fact, something else.

In the first half he had said:-

> " Well money cannot buy love mamm, it can buy a coup, I suppose but it cannot buy anything else ..... you have various people who do not wish to go through a democratic process because they done have much faith in it ..... they don't have much faith in it .... And you find the same situation happening in Chile..... And what has happened down there many that were given control of the country......... are not in control of the people..... And they have to be jailing people who used to be on their side and in fact they are jailing who were even more right wing than they were and torturing people and the situation is in a total mess. It is very easy to destabilize a country, it is not so easy to restabilize it ..... There are a few people around the place who are not so sane as we think they are."

Mr. Williams has submitted that the whole context of the broadcast was but the setting of the stage, for a vicious attack upon Plaintiff. With exhibit 1 before him Defendant goes through the various scenes - in the drama portrayed for the listeners on 'Public Eye'. For the various people who do not wish to go through a Democratic process there is a coup obtainable for a consideration. Very easy to destabilize a country as witness what was happening in Chile - people in control of the country and yet not in control of the people! People being

tortured and jailed, a total mess! So that it behooved all and sundry to be on the alert to protect themselves, their constitution, their country to the end that such things did not happen here. Defendant in effect has denied this by saying that these were only parts of the conversation and not of the context! Although in the box he admitted that it was possible for the average listener to think that he was using Plaintiff as an example of someone involved in all that he had just finished mentioning! Shortly after telling them that it was their duty as citizens to protect the constitution he said the Plaintiff was in a conspiracy to destroy that very constitution! And that because of the lying journalism! Plaintiff had struck at the constitution! So that the Plaintiff was engaged in a nefarious enterprise! And all because of the use of a word in a headline which word did not appear in the text below it! Therefore Plaintiff lying. Therefore he concludes from that lying journalism that Plaintiff is in a conspiracy to destroy the constitution of the country. That is a serious conclusion of fact in the context.

The defence is Justification. So that Defendant must prove this, -

> " .... in fair comment he need only prove the basic facts to be true. In Justification he must prove also that the comments and inferences are true also."

Lord Denning page 392 - 1969 2QB London - Artists Ltd v Littler.

But if the inference here is treated as/an allegation of fact, as I am treating it, then in view of his defence which is in the alternative I would not expect him to prove the truth of these comments as well (in addition to the truth of the allegation of fact).

He prays in aid the publication some five weeks before of a document which he describes as a secret Cabinet Submission which he maintains was wrongfully published.

This of course is something quite different. Exhibit 6 was a Cabinet Document and part of it was published in the Daily Gleaner of the 10th December, 1975 exhibit 2. After giving some detail it said that Cabinet was being asked to make three nota benes; one endorsement and one approval (paragraph 16) - all dealing with the budget - innocent enough! It was not marked confidential. No harm was done, by publishing it. Indeed Plaintiff was entitled to do so under Section 22 of the Constitution. Even assuming it was of a confidential character the Editor would be under a moral duty to publish it - The Press and the People, 15th annual report of the Press Council Autumn 1968 p. 57. It was clearly in the public's interest for him to do so. Mr. Seaga had already broadcasted parts of it and it had appeared already in exhibit 5 the day before. No evidence that it came into Plaintiff's possession other than properly, other than lawfully.

In the box he said: -

> " I did say Plaintiff was involved in a conspiracy to destroy the constitution of Jamaica. It appeared to me that the behaviour of the Plaintiff over the past several months but particularly with respect to the publication of a secret Cabinet Submission which was concerned with possible financial strategy to make sure that people could be fed and was published on 10/12 was on the face of it part of the process of laying ambushes for the Government, to destroy the credit of the Government with the people who put them in office. In case of Cabinet Submission what Plaintiff did in conjunction with Leader of the Opposition was a serious blow to the principles of Cabinet Government, which is first of all based on the test of integrity with people who swear at least two oaths before becoming a Cabinet Minister, one of which is that he shall not reveal the proceedings of Cabinet."

To him conspiracy meant a plot or cabal, people coming together to do something not necessarily illegal but probably illegitimate or just not cricket. He was not aware of it as a criminal offence and would not have suggested that.

All very well for him to say that in the box, that is what he said he intended the words to mean. By no stretch of the imagination could the average listener have gleaned that from the words of this broadcast! Maxwell agrees that the Cabinet Document was not even mentioned nor referred to by him, much less any publication of it.

> " The question is not what the Defendant intended but what reasonable men knowing the circumstances in which the words were published would understand to be the meaning i.e. the meaning in which reasonable men of ordinary intelligence with the ordinary man's general knowledge and experience of worldly affairs would be likely to understand."
>
> G89, 93.

It certainly appears that this Defendant has failed to prove this allegation of fact and I so hold. Justification fails.

5(f) Although he has admitted using these words 5(c) second-named Defendant denies (paragraph 6) that they meant that Plaintiff was guilty of the criminal offence of conspiracy.

> " The words in order to be actionable need not describe the crime in technical language, it is sufficient if the words used convey the idea that the person of whom they are spoken is guilty of the acts which constitute a crime however inaccurate these words may be from a technical point of view and even although they are not wholly devoid of a possible innocent meaning." (underlining mine)

Bureau v Campbell 1928 3 Dom. L.R. 907, 913.

It is the reasonable listener to whom the idea is to be conveyed.

Although one would say that the constitution can be amended lawfully one would hardly use the word destroy in that context. That word connotes something unlawful. There is an offence known to the law as a conspiracy to effect an unlawful purpose. Regina v Bhagwan 1972 Appeal Case, p.60, 81E punishable

by fine or imprisonment. Arch. 36th ed. paragraph 4081, G153. And a company may be indicted for it 11 Hals 4th ed. paragraph 59. Accepting that the constitution cannot be destroyed lawfully it would appear that any reasonable listener on hearing these words would understand from them that what Plaintiff is alleged to have agreed to do is to destroy the Constitution by adopting some unlawful means. In other words that it had committed the criminal offence of conspiracy. I so find.

5(f)

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For me to consider next whether these words are capable of meaning that the Plaintiff was guilty of Sedition i.e. of practices by deed which fall short of high treason but directly tend to have for their object to excite discontent or dissatisfaction; to excite ill-will between different classes of the Sovereign's subjects, to create public disturbance or to lead to civil war, to bring into hatred or contempt the Sovereign or the Government, the laws or constitutions of the realm and generally all endeavours to promote public disorder. I have considered the submissions by Learned Counsel on both sides. I hold these words not so capable.

6 gain

Are they capable of the meaning that Plaintiff was guilty of Treason Felony? Very wide. Six sections in the Act. They are capable of Section 4 meaning, that is that by those words Plaintiff was engaged in a conspiracy for the purpose of effecting a change in the state or condition of the people otherwise than by lawful means. I so hold: as also that a reasonable listener would so understand them. The phrase, "shall be liable" is not mandatory and a fine can be imposed, G153.

I find that second-named Defendant has defamed Plaintiff by his allegation of fact that it was guilty of a conspiracy to destroy the Constitution of Jamaica these words meaning also Treason Felony. These words would injure the Plaintiff's reputation and tend to lower it in the estimation

of right-thinking members of society generally, make them think the worse of it. They could not but fail to injure the goodwill or business character of Plaintiff, it being a newspaper with a duty to conduct its business along certain lines adhering of course to an observance of the laws of the land. Its reputation as a National Organ was at stake. To accuse it of a conspiracy to destroy the constitution of the very country which gave it succour is at least to accuse it of disloyalty and lack of patriotism. It's reputation as a newspaper that held a middle course in the life of the country, one that did not take sides was threatened. Now anti-Government!

I do not regard 5(c) as reasonably capable of being considered as comment. If I am wrong and it could be regarded as comment: were there any facts on which a fair minded man might honestly make such a comment; a sufficient basis of facts to warrant the comment? That must be either stated or indicated in the words complained of in 5(c). If there were, a fair minded man would not have made it, in other words it was not fair comment.

If 5(a),(b) & (e) are regarded as allegations of fact and not comments then Defendants has failed to prove their truth I would hold.

I have held that the words in 5(c) are capable of the meaning that Plaintiff was guilty of the criminal offence of conspiracy - 5(f) as also that it was guilty of Treason Felony - part of 6. Before that I had held 5(d) a reasonable inference to be drawn from 5(a) and 5(b). That disposed of the defences in paragraphs 6 and 7. I had also held these to be defamatory of this Plaintiff.

So that whatever way legal arguments run concerning Justification and Fair Comment that would not affect this aspect of this Judgment. So that if I am right in holding as I have

held above then Plaintiff would be entitled to Judgment regardless of the fate of the rest of the Judgment otherwise. And that would be as set out in the last two paragraphs herein.

DAMAGES

First-named Defendant is concerned only with the issue of damages as an interlocutory judgment was obtained against it in default of defence.

I do not hold it against second-named Defendant that he did not apologize. I do not hold it against him that he embarked on a plea of Justification that failed. Mc 14th ed. 1408 middle, G 1036. A man is entitled to defend himself in any manner he deems fit. His conduct after the material time viz on the 24th January, 1976 and 1st March, 1977 is indicative only of his state of mind then, that is at the material time and nothing else.

It is admitted on the pleadings that on the 14th January, 1976 second-named Defendant was the servant or agent of first-named Defendant. That admission would not cover liability for his subsequent conduct. In any case being a legal persona there is no grief or annoyance caused to it which could be affected by second-named Defendant's persistence in the libel. McCarey v Associated Newspapers Ltd 1964 3A.E.R. 947, 948, 959B. First-named Defendant has in effect admitted vicarious liability by virtue of the interlocutory judgment entered against it. In any event exhibit 12 makes mention of a contract between it and second-named Defendant. It follows therefore that, in my judgment, that at the material time second-named Defendant was acting within the scope of his employment.

I do not take into account in this regard the conduct of Neita when he attacked first-named Defendant on a previous occasion even if it could be said that he was acting

on behalf of Plaintiff, as he was attacking the Jamaica Broadcasting Corporation as regards its revenue, its pocket and it appears that no damage was suffered financially by Plaintiff here. Indeed the circulation was highest in that year of libel, 1976! In 1978 some two years after, public subscription by way of debenture was oversubscribed by four (4) million! Plaintiff would seem to have recovered from the effects of this libel. Plaintiff held in very high regard by the people, polls suggested that credibility is higher than that in previous government.

Although libel, (Section 3 of the Defamatory Act) it was of a fleeting nature, one utterance by second-named Defendant, 'tis true on a popular programme having thousands of listeners.

From the very outset first-named Defendant intended to apologize - page 1 of Daily News of 24/1, exhibit 12 - and did so finally not only on radio but also on Television more than once albeit in August of that year - exhibit 3.

There is no evidence of malevolence or spite in second-named Defendant against Plaintiff for me to consider aggravated damages. Rookes v Barnard 1964 Appeal Cases. 1129, 1232 nor indeed of any malice whatsoever. In the circumstances I do not take into account his conduct before action, after action or in Court at the trial. Gatley 1358, Mc 1307, 1308.

The meaning in which Defendant intends the words to be understood is material on the question of damages. G89. In cross-examination he was shown his affidavit of the 1st, March, 1977 which he admitted was his. At paragraph 3 he said:-

> " .... during ...... 1976 Editorial and other articles in the Daily Gleaner suggested that the coy (i.e. Plaintiff) was not only a political opponent of the F.N.P., the government party but also of the Government itself and was prepared not only to bring down the government but also to destroy the Constitution of Jamaica by illegally printing Secret and Confidential documents..."

Those were his views then, he said. Entirely, perfectly possible, for those to be his views on the 14th January, 1976. He amplified this somewhat by saying that the word conspiracy in the broadcast not only referred to the publication of the Cabinet document but to the use of the word force by Plaintiff and Leader of the Opposition in relation to P.N.P. defence groups. When he read the Gleaner in December exhibit 2, the publication of the secret document he considered there was a conspiracy between certain elite at Plaintiff and Leader of the Opposition. He strongly disapproved of some aspects of the role that Plaintiff was playing in the society then. He supposed he was an opponent of Opposition, a supporter of the Government. If he had thought about it he possibly would not have said, "conspiracy to destroy the Constitution of Jamaica" he might have used other words. Not sorry, no wish to retract. The publication of the secret document and what was in the Gleaner that morning was a plot, a conspiracy to mess up the Government, to make it impossible for it to work properly. He agreed that a combination of persons for an evil or unlawful purpose was a proper definition of conspiracy.

I have regard to the conditions then obtaining in the country so widespread and notorious that I can take Judicial Notice of them. Violence stalked the land, murders were commonplace, Public Opinion was outraged. Fear abounded.

I have regard to the nature of this libel which imputed to the Plaintiff the commission of the criminal offence

of conspiracy which had in itself the seeds of Treason Felony striking at the roots of government.

I am here concerned with the award of compensatory damages only, and this against two Defendants. The villain in the piece was certainly second-named Defendant. He initiated the libel and carried it through single-handed. Surely this is the conduct for which the Plaintiff should be compensated. Without him there would be no libel. First-named Defendant was the silent principal in the background. He was vicariously liable nevertheless for that conduct, as I hold that principle of Respondeat Superior applies.

The Defendants in Broome v Cassells were an author of a book and a publisher. The appeal concerned the award of exemplary damages only. The sum awarded -

> " must represent the highest common factor, that is, the lowest sum for which any of the defendants can be held liable on this score. Although we were concerned with exemplary damages, I would think that the same principle applies generally and in particular to aggravated damages, and that dicta or apparent dicta to the contrary can be disregarded....... Defendants of course, have their ordinary contractual or statutory remedies for contribution or indemnity so far as they may be applicable to the facts of a particular case. But these may be inapplicable to exemplary damages."

Pages 1063 & 4,1972 Appeal Cases, Broome v Cassells supra. 236H - first two sentences of paragraph 2 mentions only these two and not mere compensatory damages.

Here we are not dealing with exemplary or aggravated damages so that recourse may be had to contribution, if necessary. First-named Defendant stood or fell by what second-named Defendant had done. Both of them were in the soup together.

In my view a sum should be awarded reflecting this. Only fair to the Plaintiff.

Even if regarded as being obiter this dictum has strong persuasive authority. To regard first-named Defendant as being morally blameless (Smith v Streatfield) and the less blameworthy of the two would result in a lesser sum being awarded, through no fault of the Plaintiff. Commonsense would seem to be against this as contribution can set it right between the Defendants.

I would award Plaintiff $10,000 but if I am wrong and the reasoning of the House of Lords prevails then the figure would be $2,000.

Due to the decision in Hobson v Leng 1914 3KB 1245, 1252, G.1464, it would seem that first-mamed Defendant would not be liable for certain costs occasioned by the defence filed by second-named Defendant, first-named Defendant not having filed any so I leave it open to the Taxing Master.

There will be accordingly Judgment for the Plaintiff against both Defendants for $10,000 with costs to be taxed, if not agreed.

Dated this 26th day of July, 1982.

GEO. M. VANDERPUMP,
J.