IN THE FULL COURT OF THE SUPREME COURT

SUIT NO. M6. 1973

R.v. THE RESIDENT MAGISTRATE, ST. JAMES

EX PARTE AUBYN McBEAN

MOTION FOR ORDER OF PROHIBITION

BEFORE: The Hon. Mr. Justice Parnell
The Hon. Mr. Justice Wilkie
The Hon. Mrs. Justice Allen (Ag.)

Mr. Ronald Williams, Q.C., Mr. Howard Hamilton and
Mr. Enos Grant for the Applicant

Dr. Rattray Q.C., (Solicitor General) and
Mr. Austin Davis (Assistant Attorney General) as
amici curiae

April 25, 26, and 27, 1973.

May 17, 1973

Parnell, J:

On the 25th January, 1973, the applicant Aubyn McBean was granted leave to move the Full Court for an Order of Prohibition to restrain the Resident Magistrate for the parish of St.James (His Honour Mr. Boyd Carey) from continuing the trial of the applicant on two informations which alleged a contravention of the Firearms Act of 1967. Briefly stated, the two informations charge the applicant respectively with illegal possession of six rounds of ammunition and a firearm, to wit, a semi automatic pistol.

Pursuant to a search warrant granted under the Firearms Act, a party of policeman headed by the Assistant Commissioner of Police (Mr. Richard Levy) went to the premises of the applicant at John's Hall, St. James on November 20, 1972. There it is alleged that the firearm and the ammunition were found when the premises were searched in the presence of the applicant.

In support of the motion, the applicant relies on three

...........2/

affidavits. These affidavits are those of the applicant and of his attorneys-at-law Mr. Ian Ramsay and Mr. Evon Atkinson. The applicant seeks relief on two main grounds which I shall ~~avert~~ advert to hereafter.

There is a fourth affidavit before us. Miss Cynthia Kennedy the Clerk of the Courts, St.James, who appeared for the prosecution has filed an affidavit. Certain documents have been exhibited by her. They are as follows:

(a) A certified copy of the notes of evidence taken by the Resident Magistrate at the trial of the applicant on January 15, 1973;

(b) certified copies of all informations "found in the records of the Resident Magistrate's Court for the parish of St.James" and which were laid against the applicant since 1969 when Mr. Carey assumed duties in that parish. In all these informations the applicant appeared before Mr. Carey. The Solicitor General prepared a summary of these appearances, the accuracy of which Mr. Williams did not contest.

The summary shows that between December 1969 and June 1972, the applicant appeared on four separate occasions on a total of nine informations. These are the results of the appearances:

1. On 31/12/1969 a charge of possession of ganga was withdrawn. It appears that the prosecution was unable to prove that the alleged dangerous drug was in fact "ganga" within the meaning of the Law. The court will take judicial notice that this course was adopted shortly after the Court of Appeal of Jamaica by a majority, on June 12, 1969 held in Reg. v. George Green (Appeal 15/69) that it was the female ganga as distinct from the male ganga which was prohibited in Jamaica and that it was the prosecution to prove the species prohibited.

2. On 23/11/1970, no order was made against the applicant on five informations charging him jointly with several other men with the commission of certain indictable offences. The records disclose that at the end of the Preliminary Examination two other men jointly charged with the applicant were discharged on the ground that no prima facie case was made out against them.
3. On 14/2/72, two informations alleging a breach of the Dangerous Drugs Law were withdrawn. The records disclose that a senior attorney in the Department of the Director of Public Prosecutions and a Queen's Counsel (Mr. Martin Wright) appeared for the prosecution.
4. On 12/6/1972, the applicant pleaded guilty on an indictment charging him with malicious destruction of property. On June 14, the Magistrate imposed a fine of $75 or 6 weeks imprisonment at hard labour.
Under Section 268 (2) of the Judicature (Resident Magistrates) Law, Cap 179, the maximum fine which the Resident Magistrate could have imposed is $100.

The applicant having been arrested on the 20th November, 1972 for breaches of the Fire Arms Act as above outlined, he was taken before the Resident Magistrate (Mr. Carey) on November 22, when he was remanded in custody until November 29. On this date, bail was granted for the trial of the applicant on December 11.

The applicant says that he retained and instructed Mr. Ian Ramsay as his attorney on the 20th November, 1972. When the case of the applicant was called on the 11th December, Mr. Ramsay and Mr. Patrick Atkinson appeared for the Defence. But the case was not tried on the 11th December. A new date January 15, 1973 was fixed. The reason for this is explained in paragraph 6 of the affidavit of Mr. Ramsay dated the 23rd January, 1973. It states as follows:

> "That on the said date the 11th day of December, 1972, an adjournment was applied for as the defence was not ready, the time having been too short, and

..........4/

> furthermore for the reason that the defence wished to consider the proprieties of the issue as to whether an application should be made to the Learned Resident Magistrate to disqualify himself."

I understand from this paragraph that the question whether an application would be made to the Resident Magistrate to disqualify himself had not been finally settled up to December 11, 1972. The matter was still under consideration by the defence. A rough calculation will show that on December 11, about 21 days had passed since the applicant had been arrested. In the affidavit of Mr. Ramsay he states in paragraph 9 as follows:

> " That the client indicated to me very firmly that while not having anything personal against the Learned Resident Magistrate, he did not wish to be tried by him having regard to all the present circumstances."

What "the present circumstances" were will be detailed in due course. When the case was called on January 15, 1973, Mr. Atkinson appeared and asked for an adjournment on the ground that Mr. Ramsay was ill. A medical certificate showing the nature of the illness of Mr. Ramsay was in the possession of Mr. Atkinson and he brought this fact to the attention of the trial judge. The application for the adjournment was refused.

According to Mr. Atkinson, he was not prepared for the defence; and that the date January 15 was inconvenient for him. Paragraph 9 of this affidavit should be quoted in full.

> " That I was given an half - hour to prepare the defence and the trial commenced despite my further protests that I was not adequately prepared to conduct the defence."

He complains that the Resident Magistrate insisted that the case be tried and that "it was a chance for Counsel to "win his spurs." It seems to me that in referring to the opportunity for the attorney to "win his spurs" the Resident Magistrate was drawing on the history of many famous counsel who as juniors made their

mark when their leaders, at the last moment, were unable to appear for their clients. The old proverb that a spur in the head is worth two in the heels has not lost its true meaning. The notes of evidence disclose that Mr. Atkinson handled the cross-examination of the two Police Officers who gave evidence with a touch of experience and dexterity. It is this aspect of the case which I shall examine in more detail in due course, that is the ground for the contention that in refusing the application for the adjournment, the Resident Magistrate "violated the constitutional rights of the applicant in not allowing him to be defended by counsel of his choice". The corollary to this contention which Mr. Williams formulated and developed with his usual brand of interesting rhetoric is that it is open to a person aggrieved whose application before a Resident Magistrate for an adjournment during the trial of a criminal case is wrongfully refused, to apply for an order of prohibition or certiorari as the case may be in order that justice may be done. Mr. Williams further contends that even if no precedent can be found in Jamaica for this course, this Court should make one and, therefore, blaze the trial. This bold advocacy will be considered hereafter.

Let me return to "the present circumstance" referred to by Mr. Ramsay in paragraph 9 of his affidavit as the ground why the applicant does not wish to have his case tried by Mr. Carey. The facts relied on appear to be as follows:

1. In paragraph 10 of the affidavit of Mr. Atkinson, he states as follows:

> "that the instructions of the accused disclosed that the arresting policeman, Assistant Commissioner Richard Levy, on arresting him stated in words and substance that he had got off on previous occasions by bribing other policemen and Learned Resident Magistrate Mr. Boyd Carey and as a result I applied that the Learned Resident Magistrate His Honour Mr. Boyd Carey disqualify himself."

The ground for the application for the Resident Magistrate to

to disqualify himself, therefore, is based on the applicant's instructions. At the trial, Mr. Atkinson brought the "instructions" to the attention of the judge. The details were revealed in Chambers. The application for the Magistrate to disqualify himself was dismissed. During the trial, Mr. Atkinson put the substance of his client's instructions to Mr. Levy and Dective Inspector Gladstone Hutchinson who were present during the search. Both witnesses firmly denied the suggestions.

2. I now turn to the relevant portions of the affidavit of the applicant. I extract the following points:

(a) That he has appeared before Mr. Carey on at least nine occasions and on seven occasions, he was dismissed.

(b) That on seven occasions the charges were possession of ganga and possession of firearms and that he was convicted on "trivial matters" namely, assault at common law or assault occasioning bodily harm.

(c) That recently, very strong and powerful rumours have sprung up in the parish of St. James.

He details the rumours as follows:

> "that Mr. Boyd Carey has been trafficking in ganga: that some of these rumours also included my name as a trafficker in ganga, and further that I have made corrupt payments to the said Resident Magistrate, and that is why I have always been so lightly treated before him, because, in addition to working for the Government, he is in my employ as well;";

(d) That the said rumours have reached the Resident Magistrate and highter quarters and that "investigations have been or are being carried out therein";

(e) That there is no truth in these rumours; that the rumours and allegations are mischevious and dangerous and that he is being constantly harassed by the Police who fabricate charges against him "only to have the said

............7/

charges break down in Court";

(f) That he himself has heard these rumours and that "these allegations are the commonest thing in Montego Bay."

A quick look at paragraph 10 of Mr. Atkinson's affidavit will show that the rumours referred to by the applicant are wider and more detailed than the "instructions" which he received from the applicant. But what is revealing - and the court pointed it out to Mr. Williams - is this: that the applicant has not stated any where in his affidavit that in fact Mr. Levy, the Assistant Commissioner of Police did tell him on the 20th November, 1972 that he the applicant had been bribing the police and Mr. Carey. If this alleged statement of Mr. Levy to the applicant was part and parcel of the "rumour" in Montego Bay, the applicant has not confirmed in his affidavit the fact which Mr. Levy is alleged to have mentioned to him. There is a short paragraph in the applicant's affidavit. Paragraph 20 states:

> "that the above is true to the best of my information, knowledge and belief."

According to Mr. Williams, this paragraph which refers to all the preceding paragraphs indicates that what Mr. Levy is alleged to have said was in fact said to the applicant. I am unable to accept this argument. What the paragraph means - putting the broadest construction possible on it - is that where the applicant refers "to the instructions given to counsel upon the charges herein" in relation to what Mr. Levy is alleged to have said when he was arrested, he the applicant did in fact give those instructions. But it does not mean that Mr. Levy did in fact tell him so. Bearing in mind that Mr. Levy on oath has denied the allegation of the applicant - in my view it is vital that the applicant on his oath, must say whether he claims that what was said was in fact said. If it is assumed that mere rumour in an application of this kind is admissible and relevant, then the applicant appears to have missed his opportunity to prove a fact from his own knowledge which - on

..........8/

a balancing of oath against oath - could lend some credence to his complaint.

Is there, then, any admissible evidence from the applicant to support his complaint and prayer with regard to the first ground on which the motion is based? Mr. Williams says "yes". And there is a further question, namely, assuming there is admissible evidence as disclosed in the affidavit of the applicant, has he shown sufficient facts to satisfy us that there was a real likelihood of bias? Again Mr. Williams was inclined to answer this question in the affirmative although he tended to put his case on "the reasonable suspicion" of bias test instead of the "real likelihood test" as propounded in great detail by Dr. Rattray in his most helpful and enlightening submissions.

The applicant is required to file an affidavit or affidavits "verifying the facts relied on" before he can get leave to apply for an order of prohibition. If he passes that stage, the Full Court must examine the facts relied on. The right to file and make use of an affidavit in a motion of this kind is given by Sections 406 -423 of Cap.177 (Civil Procedure Code).

If I am permitted to analyse Section 408, I draw the following conclusions:

(1) Every affidavit must be confined to such facts as a witness is able to prove of his own knowledge;

(2) Where a fact referred to in an affidavit cannot be proved by the witness of his own knowledge it must be confined to statements of information and belief with the sources and grounds;

(3) No affidavit shall be loaded with matters of hearsay nor shall the affidavit be argumentative.

To this list, may be added a fourth requirement drawn from Section 413. And it is that no affidavit shall contain a scandalous allegation. However, I am prepared to give a hearing to an argument that if a witness in an affidavit refers to a matter which he can prove of his

own knowledge or through the mouth of another witness, it does not contravene the section even if the matter raised can be said to be scandalous.

In the affidavit of the applicant he relies on rumours which he says do not contain any truth. What troubles him, however, is the mere rumour itself but he challenges on behalf of himself and on behalf of the Resident Magistrate the truth in any of the rumours which he describes as "mischevious and dangerous". But dealing with the "rumours" which must mean either that he was told of them by some person or persons or he overheard some person speaking about them, he has not said when, where and by whom he heard or was told of these mischevious and dangerous allegations. Whether he heard or was told of them in a barber shop, in a rum bar, in a market or in his own home or elsewhere, he has not said.

The saying of Cato that one should be careful of a rumour lest he should be regarded as its originator, seems to have been disregarded by the applicant in his affidavit. And the only bit of evidence which he could prove of his own knowledge touching what he said Mr. Levy told him he, in my opinion, has not proved.

I have no hesitation in coming to the conclusion that there is no admissible evidence in the applicant's affidavit which satisfies Sec. 408 of the Civil Procedure Code.

He has raised a number of scandalous, damaging and argumentative matters without any foundation whatever. The very basis on which the rumour is based is proved to be untrue by the documentary exhibits referred to in the affidavit of Miss Cynthia Kennedy. To summarise the documentary exhibits, one gets these conclusions:

(1) It is not true that the applicant appeared before Mr. Carey, the Resident Magistrate on at least nine occasions. The records show that on nine informations, he appeared on four separate occasions.

(2) It is not true that the applicant appeared before Mr. Carey on seven occasions on charges of possession of ganga and firearms. The records show that the applicant appeared on two occasions on three informations for possession of ganga. On the first occasion the prosecution could not prove that the dangerous drug was ganga. And on the other occasion, the Deputy Director of Public Prosecutions appeared in person for the prosecution and withdrew the charges.

(3) It is not true that the applicant appeared before Mr. Carey for illegal possession of a firearm prior to the 22nd November, 1972.

(4) It is not true that the applicant has been convicted for assault before the Resident Magistrate. The records disclose that the Resident Magistrate fined the applicant $75 on his plea of guilty for malicious destruction of property when the maximum could be $100.

(5) There is no evidence from the records to support any "light treatment" of the applicant by the Resident Magistrate nor of any "success" during a trial which he achieved.

The conclusions of the applicant, therefore, that there is no truth in the rumours and that the basis of the rumour is without foundation are fully supported by the documentary exhibits of the Clerks of Courts. But the inaccurate particulars of the applicant to show - what he calls in paragraph 9 of his affidavit - "the record of my remarkable good fortune in the criminal courts" tend to feed the rumour "on the streets of Montego Bay" if in fact the rumour was in existence. The question then can be asked : Who started the rumour? Did the applicant in any shape or form lend any credence to it? May an accused person select what judge he wishes to try him? Can he call upon a judge to disqualify himself or may he move to have a Resident Magistrate or a Justice of the

Peace disqualified on the basis of personal interest merely on the ground of a rumour?

I shall deal with the last two questions on the basis that a mere rumour touching the integrity and personal involvement of a Resident Magistrate in a criminal case and which rumour has reached the Resident Magistrate in question is prima facie evidence that there is material for the Resident Magistrate to disqualify himself. In my view, the case for the applicant cannot be put on any higher plane. And with all respect to the courageous and forceful argument of Mr. Williams, if the case for the applicant cannot be tested in this wqy, then it cannot, on the basis of common sense, be tested at all. And even on this test, one finds great difficulty at the start. The applicant in his affidavit has referred to a front page story appearing in the Daily Gleaner of December 5, 1972. The headnote of the story reads: "Magistrate troubled by rumours, reassured."

The applicant was not in court on the day whdn Mr. Carey, the Resident Magistrqte is reported to have made certain comments with reference to "certain matters which he felt were affecting him." There is no evidence that the case of the applicant was mentioned on that date. There is no evidence that the Resident Magistrate is correctly reported. But there is evidence from Mr. Ramsay that he was present in court when the Resident Magistrate made his comments.

An examination of this report - on the assumption that it is accurate and that the applicant is permitted to exhibit it - shows the following:

(a) The magistrate referred to certain rumours which he considered were designed to destroy both his integrity and his professional career. and

(b) That the rumours and their effects were creating an atmosphere of uncertainty in which the Court could not operate efficiently.

The report shows that Mr. Ramsay speaking on behalf of the

members of the bar present, reassured Mr. Carey in a moving and eloquent eulogy. Mr. Ramsay is reported to have outlined the following points:

(1) That the Magistrate is held in the highest esteem;

(2) That there is no doubt in his (Mr. Ramsay's) mind that the Magistrate is scrupulously fair and one who would never allow anything to mar or affect his judgment.

(3) That the rumours did not have any bearing on the fairness and efficiency of the Court.

(4) That he (Mr. Ramsay) personally had every confidence in the Magistrate,

(5) That in destroying the rumours he (Ramsay) and other members of the bar would give any assistance necessary.

The only reservation of Mr. Ramsay is that

> "members of the bar - might disagree with the judge as regards sentence but in other matters they found him scrupulously fair."

I am yet to hear or read of a greater tribute paid to a judge in his life time by a practising member of the bar or anyone else. The nearest one I can remember is that paid in 1881 to Baron Bramwell by Lord Coleridge C.J. when the learned Baron retired from the Bench. Using Cicero's tribute to M.T. Brutus, the learned C.J. said inter alia:

> "You, however, succeed in leaving a sense of justice and satisfaction even with those against whom judgment is given; so that though you do nothing by favour, all that you do is favourably received." See P.228 para.2278 of King's Classical and Foreign Quotations.

If I return to what the Magistrate is reported to have said, the point remains that there is nothing to show that the "rumours" referred to by the applicant in his affidavit are the same "rumours" mentioned by the Magistrate and concerning which the applicant's leading attorney demolished with eloquence and candour.

But the Magistrate appears to have been speaking on a date

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after the applicant was arrested. If the applicant is speaking the truth, then one would expect him to tell his attorney as early as possible about the statement which Mr. Levy is alleged to have made to him and of the rumours and their source which linked him with the Resident Magistrate. On this basis, therefore, one can fairly draw the inference that when Mr. Ramsay reassured the Resident Magistrate of his and the profession's confidence in the courts integrity and impartiality, Mr.Ramsay was speaking on the background of the instructions which he had received and which Mr. Atkinson used as a base for the Resident Magistrate to disqualify himself.

I am not satisfied that the applicant has proved that what was troubling the Resident Magistrate is the same rumour which he has detailed in his affidavit. There is a missing link which has not been found despite the arguments of Mr. Williams to the contrary. Every judge has the right to make comments from the bench on a suitable occasion whenever he thinks fit. If a judge is to perform his duties effectively he must be free to refer to any matter germane to the proceedings before him which tends to affect the administration of justice generally or the efficiency, atmosphere or well-being of the Court. The public expects him to do so and to act as a kind of vigilant guardian against any encroachment or step tending to disturb the smooth functioning of the judicial system.

The submission of Mr. Williams that the only reasonable inference to be drawn is that the rumour referred to by the Resident Magistrate is the same as that referred to by the applicant is with respect based on a fallacy. If one event follows another or if two occurrences can be traced to the same period, it does not necessarily mean that the events or the occurrences are casually related. If a man had jam and cheese with his lunch and then complained of a stomach-ache about one hour after, it would be a bad argument to conclude that the jam and cheese caused the stomach-ache. Simiarly, when the Resident Magistrate spoke of rumours "designed to destroy both his integrity and his professional career",

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it does not necessarily follow that he was speaking of the rumours to which the applicant has deponed.

Mr. Williams made a concession during his reply which in my judgment is an indication of the feebleness in the applicant's case. In answer to a member of the court, he was frank enough to concede in substance that if the Resident Magistrate had not referred to any rumour at all or to the rumour "designed to destroy both his integrity and his professional career", then probably the applicant would not have been able to come before us to seek the order of prohibition.

In other words - and if I am allowed to put the concession in simple terms - he is saying this:

If the rumours referred to by the applicant were in fact "the commonest thing in Montego Bay" at the time when the case of the applicant came before the learned Resident Magistrate there may not have been a case for prohibition if the Resident Magistrate had tried him. But the Resident Magistrate having referred to a rumour which the applicant cannot identify, the mere reference shows that the Resident Magistrate was troubled in mind and therefore he would be acting as a judge in his own cause by his trying the applicant. When put in this light it is very clear in my mind that the substance of the applicant's case and the argument employed to sustain it - to use the language of Lord Davey in Reuben v. Gt. Fingal Consol. [1904 - 1907] A.E.R. Rep.460 at p.463 D.

"are as full of holes as a colander."

But let it be assumed that the Resident Magistrate was referring to a rumour that one Aubyn McBean of John's Hall, St. James was a trafficker in ganga; that the said Aubyn McBean had been treated lightly in the past by him and that the reason for this light treatment is that the said Aubyn McBean had been offering bribes to the Police and to the Resident Magistrate. Would this rumour reaching the ears of the Resident Magistrate mean that he would be acting as a "judge in a matter in which he has a substantial

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interest" if he should try Aubyn McBean on any charge whether connected with ganga tracking or even on a trivial charge e.g. using indecent language?

According to Mr. Williams, the answer should be yes. As he developed his arguments along the path leading to his affirmative answer, I trembled to think what would be the consequences to the judiciary of Jamaica at this stage of our development if his proposition was to be accepted as the law of the land.

A suggestion or a rumour which reaches a judge to the effect that he had been treating a person appearing before him often with extreme leniency because of some interest would move the judge to check the records to see if there is anything to add colour to the rumour. That is what I would expect an expereinced Resident Magistrate like Mr. Carey to have done if his recollection was not clear. And a check of the records of the court would bring the same result which Miss Kennedy has exhibited in the number of appearances of the applicant before the Resident Magistrate.

No case has been cited to us and indeed none will be found in which a mere rumour reaching a judge "that people are saying that he is closely associated with an accused man or with a witness in a case" was sufficient to cause him to disqualify himself from hearing the case. There may have been cases in which it could be demonstrated that the judge was in fact closely associated with a party in the case. But in those cases, the proved association was a matter whether in all the circumstances - the parties having been informed of the fact - the judge should preside. But there is a difference between proof of a fact and a rumour of the existence of the fact.

One of the greatest of the Victorian Judges (Chief Baron Pollock) once sustained a shock at the hands of a Senior Attorney. The Chief Baron presided over the trial of Dr. Thomas Smethurst for murder at the Old Bailey in 1859. Professor Alfred Swaine Taylor the leading medical jurist and toxicologist of his day was one of

the main witnesses for the prosecution. But it was said - and it appears that it was common knowledge - that the professor and the Chief Baron were close friends and that the professor had made an error about the arsenic and copper gauze which were submitted to him for examination. Serjeant Parry who led for the defence objected to the Chief Baron presiding on the ground of the close association between the professor and the judge. The objection was summarily dismissed. See "In the Light of the Law (1931) by Ernest Bowen - Rolands (Barrister-at-Law) p.223.

In a more recent case, the chairman of a bench was a headmaster of a school with an attendance of nearly 750 students. The headmaster had signed an adverse report against an accused who was a sixteen year old boy and an ex-student. This report was sent to another bench which had tried the young student about 3 months prior to the sitting. Objection was taken to the Chairman sitting on the ground that he had signed the adverse report against the accused and that therefore he would be biased or prejudiced. But the objection was overruled. The boy was convicted and in due course an order of prohibition was obtained to quash the conviction, on the ground of a real likelihood of bias on the part of the Chairman of the Bench. See R v. Abingdon Justices Ex p. Cousins (1964) 108 . S.J. 840.

In both cases, the question whether the trial judge should disqualify himself was decided by the Court itself and in each case there was provable material to support the objection. Mr. Atkinson states in para.12 of his affidavit that the learned Resident Magistrate ruled that there must be some "notorious fact" as the basis of apparent bias before he could disqualify himself. By "notorious fact" I take it to mean some evidence to substantiate the basis of the alleged bias. With respect, I entirely agree with the ruling of the Resident Magistrate.

To say that a judge may be chased out of his Court by a mere rumour which may be put in circulation by the idle or malicious is a proposition which refutes it self when it is stated.

Rumour and its inherent mischief have been described in verse and prose. For example, Pope in "The Temple of Fame" had this to say:

> "The flying rumours gathered as they roll'd,
> Scarce any tale was sooner heard than told;
> And all who told it added something new,
> And all who heard it made enlargements too."
> (Lines 469 - 471).

Richard Brinsley Sheridan led the prosecution of Warren Hastings before the House of Lords amidst rumours that he and his colleagues were actuated "by motives of malignity against the unfortunate prisoner at the bar." The prevailing rumours were demolished with eloquence by the orator. He assured the tribunal - in the same way as Mr. Ramsay assured the Resident Magistrate - that the rumours would have no bearing on the fairness of the proceedings. See "Worlds Great Speeches by Copeland and Lamn" p.165.

In Jamaica, rumours circulate widely. Some of these rumours are put in motion pruposely to achieve something for the originator. By the time a rumour which had its birth in St. James reaches the Corporate Area, it would have lost its swaddling clothes and a fully nourished and dangerous animal is now at large. If this dangerous animal then seeks entry into the solemn atmosphere of the High Court in order to prove a claim or to assist in any way the cause of one party then it is the duty of the Judges to summon courage if needed and throw it out with contempt in order to protect the public in general and to save the party who introduced the danger to us from himself.

It is not out of disrespect, therefore, that I do not attempt to discuss the numerous cases and propositions which Mr. Williams and Dr. Rattray outlined during the proceedings concerning the question of bias and the well known maxim that no man shall be a judge in his own cause. A judge may find a serious and persuasive discussion on a maxim or a rule entertaining and instructive. But a maxim does not act in a vacuum. In a court of law, a maxim has relevance

if it can be related to proved and admissible facts.

In my view there is nothing in the three affidavits filed on behalf of the applicant which could possibly sustain a semblance of an argument to support the first limb in this motion.

But before I close this portion of my judgment I must comment on a certain matter. Every prerogative order which an applicant seeks is a discretionary remedy. Every applicant, therefore, who comes to a Full Court for relief by way of prohibition or certiorari must demonstrate that he is acting in good faith and for the benefit of himself. And this brings me to the duties of an attorney engaged in the conduct of a case. Let me outline a few of them. The General Legal Council has prescribed certain canons for the guidance of all attorneys-at-law and these were published in the Jamaica Gazette Extraordinary of January 6, 1972. For the purposes of this case I shall mention, in my own language, the following:

(1) Every attorney has a duty to his client to raise and advance as courageously as he can every point, and every argument however distasteful which he the attorney thinks will assist the case of his client. But as an attorney, he has an overriding duty to the court and the public. This duty to the court and the public may conflict with the personal wishes and interests of the client. And where there is a conflict, it should be resolved in favour of the court or of the public which the attorney is sworn to serve.

(2) No attorney should lend himself to casting aspersions on the other party or witness or on any third party unless there is sufficient basis in the information which the attorney has in his possession.

(3) Every attorney should observe the golden rule, which is, that if he is in doubt, he should not in the conduct of a case raise an issue, ask an additional question or even call a witness or an additional witness.

(4) What an attorney asserts for the truth, the court accepts but what he advances in argument the court judges.

And the opinion of Dr. Johnson to Boswell when the latter inquired whether the practice of the law "does not hurt the fine feeling of honesty" should not be dismissed. The famous Dr. Johnson is reported to have said:

> "Why, no sir, if you act properly. You are not to deceive your clients with false representations of your opinion; you are not to tell lies to a Judge"
>
> See a note of the dialogue between Boswell & Johnson in (1896), 101 L.T. 280 at p.281.

I entertain grave doubts whether Mr. Ramsay if he had appeared, could have asked Mr. Carey on the 15th January, 1973 to disqualify himself as a result of "rumours" when Mr. Ramsay himself a few weeks before had paid such a fine tribute to the integrity, impartiality and scrupulous fairness of the presiding judge. No one could reasonably suggest that Mr. Ramsay was telling any lies to the judge. He was speaking on behalf of himself a senior member of the bar of Jamaica and of the other members then present in court. And I agree with Dr. Rattray's submission that on the occasion when Mr. Ramsay spoke he acted:

> "as a responsible and right thinking member of the Jamaica Society and also as a member of the bar."

The advice I would expect, therefore, that he would tender to the applicant is something like this:

> "You should not raise any question about the competence of the Resident Magistrate to try your case. I have already told him in open court - and it has received wide publicity - that he is a fair, honest and upright judge. I have also promised to help him destroy the rumours which he has heard. If you do not accept my advice, I will exercise my right under Canon 4 (r) (i) and (v) of the rules guiding my profession to withdraw from the case."

But what do we find? On the 16th January, 1973, the day after the trial began, Mr. Ramsay wrote a letter to the Clerk of Court,

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St. James in strong terms protesting the refusal of the Resident Magistrate to adjourn the case which was fixed for continuation on January 29, a date not suitable to him. Mr. Ramsay had an engagement in Bermuda on the 29th January. I shall refuse to include the contents of the letter in this judgment. It was read by Mr. Williams during the proceedings. It is amazing that one can find an attorney who is prepared to write a letter in such a tone for submission to a Resident Magistrate.

On the 22nd November, 1973, the Clerk of Courts, by letter informed Mr. Ramsay, inter alia, as follows:

> "I have brought this letter to the attention of the Resident Magistrate and I am directed by him to inform you that he is committed to continue the hearing of this case on the 29th January, 1973."

The Jamaica Gazette of the 25th November, 1971, shows that the regular day for the criminal session of the Resident Magistrates court, Montego Bay is a Wednesday. It seems therefore, that special fixtures were made to try the case of the applicant.

The 15th January was not a Wednesday. On the 23rd January, the following day, affidavits were sworn to by Mr. Ramsay, Mr. Atkinson and the applicant. The application seeking leave was filed on the said 23rd January and as I have already mentioned, leave was granted on January, 25.

Everything seems to have moved quickly in order to meet the situation whether or not January 29 would see a continuation of the case without Mr. Ramsay or a halt in the trial with an opportunity for the applicant's leading attorney to be in Bermuda.

That Mr. Ramsay was peeved and angry when the Resident Magistrate refused the application for adjournment, he has not concealed. Paragraph 15 of his affidavit which is argumentative speaks eloquently.

He states:

> "That to my mind, in refusing the application the learned Resident Magistrate showed utter contempt

> for the conventions of the Bar, set at naught the ordinary decencies and usages of mankind, whereby sickness or other act of God has always been given respectful and due allowance in the dealings of men, and more so of a court; nor was there any evidence or information available to the Magistrate that I was so unlikely to recover that no useful purpose could be served by adjourning the case at all."

What is the position?

Is this motion a genuine attempt to seek relief by way of a prerogative order for a genuinely aggrieved applicant?

Is it being seriously contended that any experienced attorney in the face of his own public and solemn declaration that he believes in the integrity and scrupulous fairness of a judge would advise a course of action and maintain it by giving evidence that his client will not secure a fair trial at the hands of that judge merely on the ground of a rumour which the attorney promised he would assist in destroying? If the answer is "no" - and I hope that it is correctly answered - then what could be the true motive behind this motion? I shall leave it for right thinking members of the public to give an answer if they can.

The second limb of the argument to the effect that by refusing the adjournment, the Resident Magistrate violated the constitutional right of the applicant to be defended by the counsel of his choice can be easily disposed of.

There is a section in our Constitution which provides as follows:

> "Every person who is charged with a criminal offence shall be permitted to defend himself in person or by a legal representative of his own choice."
>
> Sec. 20 (6) (c).

But there is a difference between permitting an accused to defend himself by his attorney and refusing an application for the adjournment of the trial of a case made by that attorney or by someone on his behalf.

Mr. Williams submitted that when the Resident Magistrate refused the application for an adjournment on the 15th January, this was unreasonable and it amounted to a breach of natural justice. He argued further that the mere refusal of an adjournment of the trial of an accused could amount to an excess of jurisdiction. Reference was made to paragraph 4 of the affidavit of Mr. Ramsay where it is stated that Mr. Atkinson was to act as junior:

> "for the purpose of taking notes and other help appropriate to juniors."

In my experience, where a leader is unable for any reason to take a case or continue with a cse, it is always competent for the junior to take over. In the language of Mr. Ramsay that would be "help appropriate to juniors." A junior cannot be relegated merely to note taking. And even if this understanding is made clear as between the leader, the junior and the client, this does not prevent a judge to call upon junior attorney to undertake some duty relevant to the defence in the absence of the leader.

The evidence of Miss Kennedy is to the effect that both Mr. Ramsay and Mr. Atkinson appeared for the applicant and the records are so endorsed. In my view, Mr. Ramsay's "note taking limitation" does not make Mr. Atkinson any less an attorney of choice of the applicant within the meaning of Sec. 20 (6) (c) of the Constitution.

What should not be forgotten is this:

An order of prohibition seeks to prevent an inferior tribunal from continuing to exceed its jurisdiction or from committing some threatened excess of jurisdiction. The remedy seeks to prevent some future mischief. Every Resident Magistrate and Justice of Peace has a statutory power to grant or refuse an adjournment during the hearing of a criminal case. See Sections 279 and 282 of Cap.179 and Sec. 15 of Cap.188. And even without relying on the statute there is an inherent power of adjournment where a case cannot possibly be completed in a day. But a power to grant an adjournment - includes a power to commit an error in the exercise of a discretion.

If, therefore, a Resident Magistrate wrongfully exercises his discretion in considering the application for the adjournment of a criminal case, his error is not an excess of jurisdiction. It is an error committed while exercising an undoubted jurisdiction. If an order were to be drawn up at that stage it would merely show the refusal of the application and the date set for trial. No error of law could be found on the face of the record. This leads me, therefore, to this proposition: that in Jamaica the mere refusal of an application for the adjournment of a criminal case by a Resident Magistrate or a Justice of the Peace, is not a ground to seek an order of prohibition or certiorari as the case may be. But this would leave the aggrieved applicant to argue in the Court of Appeal if the trial ended in his conviction some ground of appeal to the effect "that the refusal of the adjournment was unreasonable in the circumstances and it resulted to the prejudice of your applicant in the presentation of his defence."

All the cases cited by Mr. Williams in support of this limb of the motion all point to a situation where an appellant was able to show a Court of Appeal that the trial court erred in refusing an adjournment of his trial with the result that he was thereby prejudiced in the conduct of his defence.

He could point to no case - and I know of none - where the High Court of Jamaica at any time ever granted an order of prohibition or certiorari touching the refusal of an adjournment of a criminal case by either a Resident Magistrate or a Justice of the Peace. His clarion call, therefore, that we should blaze the trail in this respect will not be answered by us. The trail should not be blazed where a clear path has already been made. That would be an excess of judicial energy and it is the duty of the court to preserve such energy for appropriate exploration of untouched areas.

Owing to the industry of Dr. Rattray, a case decided nearly 20 years ago was brought to our attention. It supports the proposition I have already explained. During the hearing of a

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case, the Justices who were sitting as an appeal committee refused an appellant an adjournment in order that he could call a witness to prove that certain documents which he had in his possession were genuine. The counsel for the prosecution had suggested that the documents were forgeries. The appeal was dismissed. The appellant obtained leave to apply for an order of certiorari on the ground that the refusal of the adjournment by the Appeal Committee amounted to a denial of natural justice. When the hearing came before a very strong Divisional Court comprising of (Goddard C.J; Sellers and Havers, JJ)., the application was refused on the ground that to make an order of certiorari because the justices had refused to grant an adjournment would be to extend the ambit of the remedy beyond all authority. See Re Ekins (1953), 117, J.P. 705.

The same reasoning is to be found in a very recent case. The hearing of an appeal by the Crown Court was fixed for a certain date. An application was made to adjourn the date in order that important witnesses abroad could be given an opportunity to attend the hearing and to give evidence on the applicant's behalf. The application for adjournment was refused. An application for certiorari was dismissed as no effective ground for the order had been shown. See Crawley Urban D.C. V. Cosmos Tours /1973/ Crim. L.R. 37.

There is much to regret that steps were ever taken to launch this ill-advised motion. If remorse did not make itself felt very shortly after the application seeking leave was filed then there is more to regret that a cool and subsequent reflection did not result in arresting the prosecution of what, with its mischievous implications, was doomed to failure.

I shall now attempt - owing to the importance of the case - to summarise as briefly as I can why, in my judgment this motion should be dismissed and the order of the 25th January granting leave should be discharged.

(1) The applicant is relying on mere rumour to prove his complaint and he has not even named one "source" of the rumour;

(2) The applicant has pointed to the basis of the rumour and when examined on the background of the documentary evidence, it is clearly shown that his "particulars of the successes he claims in the criminal court" are untrue.

(3) There is no admissible evidence from the applicant to ground his motion despite his raising damaging and scandalous allegations in his affidavit.

(4) The applicant's leading attorney had assured the Resident Magistrate that any rumour - whoever put it in motion and whatever the nature - would be destroyed with his assistance.

(5) The applicant's leading attorney speaking at a time when the applicant ought to have given instructions about the rumours - publicly and unreservedly extolled the virtues of the trial judge and expressed his own confidence in the integrity and fairness of the trial judge.

(6) Every application for a prerogative order should demonstrate that it is genuinely made for the prayer which it contains and in this case I am not so satisfied.

(7) Where an accused is represented by two attorneys-at-law, he is still represented by an attorney of his choice if his defence is undertaken by the junior attorney alone.

(8) A mere refusal of an adjournment of a criminal case by a Resident Magistrate is not a ground in Jamaica to apply for a prerogative order of prohibition or certiorari.

Our courts and judges have always occupied a high place in the eyes of the public. The judge - whether a member of the High Court or of the lower branch - performs in order to promote the administration of justice. He is a public figure and owes an obligation to no one outside of the public in general. He must be true to his oath and must be susceptible to the operation of his own conscience. He draws his remundration from the public purse; he is no client's tool nor is he subservient to any attorney, official or other person however powerful he may think himself to be. Like Caesar's wife, the judge is expected to be above suspicion. No one expects

him however, to be a saint or to be as grim as if he were a son of Europa. But if his integrity, impartiality and good name should be questioned in a court of law or elsewhere, one expects that those who bear that heavy burden should make the attempt on solid and provable grounds. Any attempt placed on a lower plane must cause damage to the public and incur shame on the heads of those who try and fail.

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