JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL No. 27/74

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Swaby, J.A.

REGINA V. LASCELLES TUCKER

Mr. V. B. Grant, Q.C. and Mr. W. Hill, Q.C. for the Appellant.

Mr. J. Kerr, Q.C. and Mr. R. Stewart for the Crown.

JUNE 19 - 21, 1974
JULY 24, 1974

GRAHAM-PERKINS, J.A.

This is the judgment of the court.

The appellant was, in November 1973, convicted by His Honour Mr. U. D. Gordon, the Resident Magistrate for Portland, on three counts of an indictment which charged him with the offences of seditious libel and libel. These charges resulted from the alleged publication by the appellant of certain pamphlets on November 29, 1972 in the Parish of Portland.

Count 1 charged the appellant with seditious libel. The particulars therein read:

> "Lascelles Tucker ... seditiously wrote and published a certain seditious libel concerning Her Majesty's Government in Jamaica and the Prime Minister of Jamaica in a pamphlet headed "BEHOLD THE RED ROD" containing the following seditious matters:-
> I, Joshua have done the following so that Communism may be established in Jamaica.
>
> 1, Brought a Red Chinese Trade Mission from Communist China to establish trade links with Red China and other Communist

Countries so that Jamaica may eventually stop all trading with the United States, Canada and Great Britain.

Down with the Queen.

2, Visit to Jamaica of Cuban Military Mission, headed by Dr. Jose Mejar Chief of Communist Security in Cuba to help the People's National Party set up Communist Organisation and Machinery so that I, Joshua, shall rule Jamaica forever.

3, Established Diplomatic relations with Red China so that Red Chinese may come to Jamaica in great numbers and help establish the New Jerusalem, for all true Communists.

POWER TO THE PEOPLE

POWER TO THE COMMUNIST

HAIL THE MAN

AND THAT THE WORD "Joshua" therein referred to, and was meant to refer to, the Prime Minister, Minister of External Affairs and Minister of Defence Michael Manley and imputing, inter alia, that the said Michael Manley intended to establish Communism and dictatorship in Jamaica."

The second count also charged seditious libel and the particulars therein were:

"Lascelles Tucker ... seditiously wrote and published a certain seditious libel concerning Her Majesty's Government in Jamaica and the Prime Minister of Jamaica containing the following seditious matters in a pamphlet headed -

JAMAICA IN POLITICAL UPHEAVAL STATE OF EMERGENCY SOON TO BE DECLARED and containing inter alia:-

"Army and Police take over Government buildings Castro coming to Jamaica before Christmas.

Cuban Guerillas infiltrate - training Jamaicans in the Blue Mountains, Jamaica now Police State - under Manlie the dictator.

Jamaicans now buy Guns from Russia, The Thoughts of Mao from China and Che Guveras diary from Cuba.

No one can own anything of their own, nor can they Grumble" and

the words,"Manlie" therein meaning the Prime Minister Michael Manley and the words "Army and Police" meaning the Jamaica Defence Force and the Jamaica Constabulary Force respectively and thereby imputing that Jamaica is or is becoming a Communist State or a Totalitarian State."

The third count charged libel. The particulars of this count embraced and recited the contents of the same pamphlet that formed the subject matter of count 1.

At the end of a hearing lasting some eight days and extending over a period of some seven months the Magistrate expressed his conclusion as to the appellant's guilt in the following terms:

"Accused (1) published the pamphlets exhibited in case exhibits 1 - 4.

(2) Publication seditious and done with seditious intent.

(3) Accused knew of the falsity of the allegations in the pamphlets Behold the Red Rod, Jamaica in state of political upheaval."

It would, we think, have been particularly helpful if the magistrate had dealt more fully with his finding at (2) above. Regrettably, however, neither the practice nor the rules of a Resident Magistrate's Court require him to record the reasons for his conclusion. We observe, too, an apparent ambiguity in the finding at (3) above. This finding presumably refers to count 3. The pamphlet headed "Jamaica in state of political upheaval" did not form any part of the third count.

After hearing Mr. Hill in mitigation the resident magistrate proceeded to award concurrent terms of imprisonment at hard labour - six months in respect of counts 1 and 2 respectively, and three months in respect of count 3.

The appellant now comes to this Court and advances several complaints against his convictions. We set out only those complaints which in our view merit consideration. With respect to the conviction on counts 1 and 2, it was urged that:

"(b) The contents of the pamphlets allegedly published by the accused are not seditious.

(c) There is no evidence of incitement to violence and disorder ..."

As to the conviction on count 3 the complaints were:

"(b) The contents of the pamphlets allegedly published by the accused are not libellous.

(c) There was no evidence of the likelihood of the words allegedly published inciting a breach of the peace and any possibility of any such incitement was negatived by the several witnesses in the case.

(e) A prosecution should not have been instituted in respect of this charge and the virtual complainant should have been left to pursue his civil remedies if any."

There was a supplementary ground which urged this Court to say that the second innuendo could not be derived from the words of the pamphlet. The appellant also complains against the sentences awarded as being excessive in the circumstances of the case.

It is not, in our view, necessary to recite in any detail the evidence on which the prosecution relied to establish the charges in the indictment. The merest outline will suffice. On Wednesday, November 29, 1972 a Mr. Charles Fuller, a grocery and tavern operator, was in his grocery at Grange Hill in Portland at about 10.30p.m. A few other men, including a Mr. Derrick Wilson, were in the bar indulging in that very popular Jamaican pastime - "talking politics". The appellant entered the bar and "introduced himself to everybody". He said: "Gentlemen on my way coming I saw some pamphlets on the street and I took them up, would you like to see them?" Upon being told by these men in the bar that they wished to see the pamphlets the appellant went to his car and returned with them. According to Fuller, "when he brought them in people

went and looked at them. Wilson asked 'But Mr. Tucker don't these pamphlets are propagandos?' Tucker replied:'I have got the feeling myself that it is propaganda'. Wilson said to Tucker: 'But by the way Mr. Tucker who print these pamphlets?' Tucker replied: 'Mr. Wilson I know nothing about them I saw them on the street and took up a few.' These pamphlets certainly did not cause any stir, nor did they appear to have provoked any concern in anyone in Fuller's bar. Indeed Wilson asked to be given some of the pamphlets so that he could, at some future time, remind the appellant of the gross stupidity of their content.

Later the same evening the appellant was seen by a Mr. Haughton to drive a car into premises occupied by the Public Works Department in Manchioneal. Shortly after Haughton heard this car drive off he saw " a lot of papers blowing over the place ... scattered from where the car was ..." The following morning on his way to his office Haughton picked up three pamphlets from the ground in the premises in which he had seen the appellant. "I read one ... I considered it damn foolishness."

We turn now to the grounds of appeal. It will be convenient to deal with counts 1 and 2 and grounds (b) and (c) together. The first and critical question that arises is: Did the publication by the appellant of the relevant pamphlets constitute the publication of a seditious libel? Not, be it noted, as the ground of appeal at (b) above appears to suggest, whether the contents of the pamphlets were seditious. As the great jurist, Sir James Fitzjames Stephen, says in the second volume (1883) of his "History of the Criminal Law of England" at p. 298:

> "As for sedition itself I do not think that any such offence is known to English law. It is, indeed, difficult to understand how a seditious purpose could be carried out otherwise than by one or more of the three methods enumerated ... The articles from my Digest ... state the present law on this subject as I understand it, and I may observe that these articles were adopted by the Criminal Code Commission almost verbatim in their Draft Code,

in which they form section 102. In the report the Commissioners say that this section appears to them 'to state accurately the existing law.' "

He then details the two extreme views "each of which has had a considerable share in moulding the law of England with the practical result of producing the compromise which I have tried to express in the articles of my Digest. It has no claim to that quasi-mathematical precision which even in the most careful legal writings is rarely, if ever, attainable, but I think it is sufficiently distinct to afford a practical guide to judges and juries in the discharge of duties which are now seldom imposed upon them." We set out three Articles the first two of which are generally recognized as accurately stating the law as to seditious libel, at any rate, at the time when they were formulated.

"ART. 91. SEDITIOUS WORDS AND LIBELS. Everyone commits a misdemeanour who publishes verbally or otherwise any words or any documents with a seditious intention ... If the matter so published is contained in anything capable of being a libel, the offence is called the publication of a seditious libel.

ART. 93. SEDITIOUS INTENTION DEFINED. A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty ... or the Government and Constitution of the United Kingdom, as by the law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects ...

ART. 94. PRESUMPTION AS TO INTENTION. In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious,

> every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

What is the nature of the intention which the prosecution is required to establish? Article 94 of Stephen's Digest was, quite clearly, predicated on the basis of the objective test. At page 359, Volume 2, of his History of the Criminal Law, however, he states:

> "The Libel Act (i.e. the Act Of 1792) must be regarded as having enlarged the old definition of a seditious libel by the addition of a reference to the specific intentions of the libeller - to the purpose for which he wrote. And a seditious libel might since the passing of that Act be defined (in general terms) as blame of public men, laws, or institution published with an illegal intention on the part of the publisher. This was in practice an improvement upon the old law, which indeed was, as I have already pointed out, altogether inconsistent with serious political discussion."

In R. v. Burns (1886) 16 Cox C.C. 355, Cave, J., in his charge to the jury, warned that the fact that the natural consequences of the words used was disorder was not enough. "It is one thing" said Cave, J., "to write with a distinct intention to produce disturbances, and another thing to write recklessly and violently matter likely to produce disturbances." Cave, J., entertained no doubt, as did Stephen, that what was relevant was the real, and not the presumed, intention of an accused. Some 23 years later Coleridge, J., presided at the trial of R. v. Aldred (1911-1913) 22 Cox C.C. 1. In the course of his summing up he told the jury, at p. 3:

> "The word 'sedition' in its ordinary natural signification denotes a tumult, an insurrection, a popular commotion, or an uproar; it implies violence or lawlessness in some form; but the man who is accused may not plead the truth of the statements that he makes as a defence to the charge, nor may he plead the innocence of his motive; that is not a defence to the charge. The test is not

> either the truth of the language or the innocence of the motive with which he published it, but the test is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of State? - and I need hardly say that anything in the way of assassination would be comprehended in the definition."

It would appear, from his use of the word "calculated", that Coleridge, J., preferred the objective test. It should be observed, however, that the learned judge, in an earlier passage (ibid at p. 3), had said:

> "Nothing is clearer than the law on this head - namely, that whoever by language, either written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditious libel."

The words underlined are clearly referable to the particular form of seditious libel with which Aldred was charged, i.e. "that by a publication .. he used language implying that it was lawful and commendable to employ physical force in any manner or form whatsoever against the Government of our Lord the King, or towards and against the British liege subjects of our Lord the King." By his definition of what constituted the publication of a seditious libel in the particular circumstances of the case with which he was dealing Coleridge, J., clearly regarded an incitement to violence as essential. As he saw it the simple question was whether the publication by Aldred involved an incitement to violence. It is in this context that the words "was the language calculated, or was it not, to promote public disorder or physical force or violence," must be understood. And so understood it becomes clear that Coleridge, J., was not, indeed, subscribing to the objective test. The learned judge was, in effect, asking th jury to say whether by the language used Aldred intended to promote disorder or physical force or violence in a matter of State.

As recently as 1947 Birkett, J., in R. v. Caunt (see 1948 64 L.Q.R. 203) was of the clear view that a real intention to cause disorder was essential. It is true that there are some cases in the first half of the nineteenth century that appear to proceed on the objective test. See for example R. v. Burdett (1820) 1 State Tr. N.S. 1; R. v. Lovett (1839) 9 C. & P. 462. In our view, however, the weight of modern authority is quite undoubtedly, in favour of the subjective test, i.e. proof of a real, as distinct from, a presumed, intention.

There still remains the further question: What must an accused be shown to have intended? Is the prosecution required to prove merely that an accused published seditious words with the intention to achieve one of the objects specified in what has been called "the classic definition"? Or is it required to go further and establish an intention to achieve that object by violence? In R. v. Collins (1839) 9. C. & P. 910 Littledale, J., summing up to the jury, said at page 912:

> "With respect to the second resolution, it is no sedition to say, that the people of Birmingham had a right to meet in the Bull-ring, or anywhere else; but you are to consider, whether the words that they 'are the best judges of their own power and resources to obtain justice,' meant the regular mode of proceeding, by presenting petitions to the Crown, or either House of Parliament, or by publishing a declaration of grievances; or whether they meant that the people should make use of physical force as their own resource to obtain justice, and meant to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder."

We observe, parenthetically, that this direction by Littledale, J., was described by Stephen at p. 374 Vol. 2 of his History of the Criminal Law as "stating the modern view of the law on this subject plainly and fully." He said, too, at p. 375, " ... nothing short of direct incitement to disorder and violence is a seditious libel."

In R. v. Caunt (supra) Birkett, J., said:

> "It is not enough to provoke hostility or ill-will. Sedition has always had implicit in the word public disorder, tumult, insurrections or matters of that kind."

In R. v. Burns (supra) Cave, J., directed the jury that they could not find against the defendant unless they found that he incited those whom he was addressing to resort to violence. As observed in the 8th Edn. of Wade & Phillips on Constitutional Law at p. 516:

> "... It is now established beyond doubt that the prosecution must prove an incitement to violence over and above the defamatory criticism of public affairs ... If an incitement to violence were not an essential ingredient, it would be arguable that the speeches of opponents at any modern General Election might constitute the offence of sedition under this limb of the definition."

In our view the pamphlets on which the first and second counts of the indictment depended, and the evidence surrounding their publication by the appellant, fell very far short of what was required to sustain a finding of guilt on either of these counts. We are by no means certain what was or were the precise object or objects the prosecution claimed the appellant was seeking to achieve by publishing these pamphlets. What is certain is that in no sense imaginable can it be asserted that the contents of these pamphlets involved an exhortation or incitement to violence either in the case of those persons present in Fuller's bar, or in the case of Haughton, or, indeed, in the case of anyone else. For the foregoing reasons we are of clear opinion that the appeal in respect of the convictions on counts 1 and 2 must be allowed.

We turn now to count 3 about which little, if anything, need be said. It is true that criminal proceedings for libel are a rare event and not encouraged by the courts. It is equally true that the likelihood

of a breach of the peace should be regarded as a critical consideration by those charged with the responsibility of deciding whether in a given case a prosecution is desirable. That likelihood, however, is not an essential of criminality. See R. v. Wicks (1936) 25 Cr. App. Rep. 168. Having said this, we entertain no doubt that the matter in the pamphlet with which count 3 deals is libellous, and that the conviction should not be disturbed.

There remains the matter of sentence. In respect of count 3 the magistrate awarded a sentence of three months at hard labour. From the records it appears that the appellant had, up to the time of his conviction, enjoyed an unblemished record. It was said of him that he had "in his own way and in his own time given public service to the country". He is a Parish Councillor. He was at one time a Chairman of the Portland Parish Council and Mayor of Port Antonio. Although the indictment charged that he had written the libel the prosecution made no attempt to prove this and, indeed, impliedly accepted that he was not the author of the libellous matter. The circumstances of the publication of this matter do not suggest that the appellant was doing any more than pursuing another favourite Jamaican pastime - disseminating the idle rumour. Those to whom he chose to publish this matter reacted with complete indifference. Mr. Fuller thought that those pamphlets the appellant left in his grocery were very suitable for wrapping his saltfish Mr. Wilson saw in them a cause for mirth. Mr. Haughton placed those he picked up in his yard in a drawer in his desk. In all the circumstances we think that the justice of this case may be met by the infliction of a fine in the sum of $75.00 with an alternative of 3 months imprisonment in default.