

Leonard Hector

Appellant

v.

- (1) The Attorney General of Antigua and Barbuda
- (2) The Commissioner of Police and
- (3) Samuel Barzey, Additional Magistrate District "A"

Respondents

FROM

THE COURT OF APPEAL OF THE  
EASTERN CARIBBEAN SUPREME COURT

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
22ND JANUARY 1990  
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*Present at the hearing:-*

LORD BRIDGE OF HARWICH  
LORD BRANDON OF OAKBROOK  
LORD TEMPLEMAN  
LORD GRIFFITHS  
LORD ACKNER

*[Delivered by Lord Bridge of Harwich]*

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The appellant is the editor of a newspaper published in Antigua known as The Outlet. He was charged in respect of an article published in The Outlet in May 1985 with an offence under section 33B of the Public Order Act 1972, as amended by the Public Order (Amendment) Act 1976. The section provides:-

"Notwithstanding the provisions of any other law any person who -

- (a) in any public place or at any public meeting makes any false statement; or
- (b) prints or distributes any false statement which is likely to cause fear or alarm in or to the public, or to disturb the public peace, or to undermine public confidence in the conduct of public affairs, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding five hundred dollars or to a term of imprisonment not exceeding six months."

The charge alleged that the article complained of was a false statement which was likely to undermine public confidence in the conduct of public affairs. The appellant challenged the prosecution on the ground that the specific provision of section 33B under which the charge was laid violated the Constitution of Antigua and Barbuda ("the Constitution"). In due course the criminal proceedings were stayed pending determination of an application by the appellant to the High Court pursuant to section 18 of the Constitution seeking appropriate relief. The application was heard by Matthew J. who declared that the appellant's constitutional rights had been contravened by the criminal proceedings and that section 33B was unconstitutional to the extent that it contained the words "or to undermine public confidence in the conduct of public affairs". He ordered that the criminal proceedings be quashed. The judge's order was reversed on appeal by the Court of Appeal of the Eastern Caribbean Supreme Court (Robotham C.J., Bishop and Moe JJ.A.). The appellant appeals to Her Majesty in Council by leave of the Court of Appeal.

The relevant provisions of the Constitution on which the appeal turns are contained in Chapter II, sections 3 and 12 as follows:-

"3. Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

(a) ...

(b) freedom of conscience, of expression (including freedom of the press) and of peaceful assembly and association; and

(c) ...

the provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

12.(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression.

(2) For the purposes of this section the said freedom includes the freedom to hold

opinions without interference, freedom to receive information and ideas without interference, freedom to disseminate information and ideas without interference (whether the dissemination be to the public generally or to any person or class of persons) and freedom from interference with his correspondence or other means of communication.

(3) For the purposes of this section expression may be oral or written or by codes, signals, signs or symbols and includes recordings, broadcasts (whether on radio or television), printed publications, photographs (whether still or moving), drawings, carvings and sculptures or any other means of artistic expression.

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) that is reasonably required -

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings and proceedings before statutory tribunals, preventing the disclosure of information received in confidence, maintaining the authority and independence of Parliament and the courts, or regulating telephony, posts, broadcasting or other means of communication, public entertainments, public shows; or

(b) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion.

The argument before their Lordships was directed to two issues. The first affects perhaps the broad merits of the matter, though hardly of direct relevance to the technical issue of constitutionality. It was urged, for the respondents, in defence to any attack on the provision in question as amounting to political censorship, that it would always be a defence to a charge laid under this provision that the defendant had an honest belief on reasonable grounds in the truth of the statement which he had made, printed or distributed. On this basis it was submitted that it was unobjectionable to penalise false statements made without taking due care to verify their accuracy. Their Lordships do not find it necessary for present purposes to examine the question what element of mens rea is required as an ingredient of the offences created by section 33B. They observe, however, that it would on any view be a grave impediment to the freedom of the press if those who print, or a fortiori those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based.

The second and the crucial issue on which the appeal turns is whether the provision in question can be justified under section 12(4) of the Constitution. It is common ground that if it is to be justified at all, it can only be by the language of section 12(4)(a)(i) which protects any law "to the extent that the law in question makes provision that is reasonably required in the interests of ... public order". The statements against which section 33B is directed may fall foul of the section on any one of three grounds: (1) that they are likely to cause fear or alarm in or to the public; (2) that they are likely to disturb the public peace; or (3) that they are likely to undermine public confidence in the conduct of public affairs. It appears to their Lordships that, insofar as it is necessary to make provision in the criminal law in the interests of public

order against the dissemination of false statements likely to disrupt or disturb public order, the whole field is effectively covered by condemnation of statements which offend against the section on grounds (1) or (2). The phrases "public order" in the context of section 12(4) of the Constitution and "public peace" in the context of section 33B of the Public Order Act express the same concept and seem to their Lordships to be virtually interchangeable. So much is conceded by Mr. Newman Q.C., appearing for the respondents. He accepts that, if a statement likely to undermine public confidence in the conduct of public affairs is also of such a character that it is likely to disturb public order, a prosecution in respect of it under section 33B can be mounted on ground (1) or (2), and to this extent the language of ground (3) is an unnecessary enlargement of the ambit of the section.

Mr. Newman rightly points out, however, that the language of the statute should be construed in the light of the presumption of constitutionality as explained by Lord Diplock, delivering the judgment of the Board in *Attorney-General of The Gambia v. Momodou Jobe* [1984] A.C.689, 702. This requires that, if it is possible to read the statutory language as subject to an implied term which avoids conflict with constitutional limitations, the court should be very ready to make such an implication. The basis of the implication which Mr. Newman suggests lies in the submission that a false statement likely to undermine public confidence in the conduct of public affairs, although not likely to disturb public order, may have a tendency to do so falling short of likelihood. Mr. Newman accordingly submits that section 33B should be construed as though the phrase "likely to undermine public confidence in the conduct of public affairs" were immediately followed by the words "in a manner which tends to disturb public order".

Their Lordships are willing to give full weight to the presumption of constitutionality but think that the attempt to contrive a suitable implied term in this context only serves to emphasise the inherent conflict between the provision which it is sought to rescue and the constitutional safeguards of free speech. The implication suggested in Mr. Newman's submission is, in their Lordships' judgment, unacceptable for the following reasons. If, in any particular case, a false statement likely to undermine public confidence in the conduct of public affairs is also of such a character that it is likely to disturb public order, an offence under section 33B can be charged on ground (1) or (2) and ground (3), even with the addition of the suggested implied term, is otiose for the reasons already explained. If, on the other hand, a particular false statement although likely to undermine public confidence in the conduct of public affairs is not likely to disturb public order, a law which makes it a criminal offence cannot be reasonably required in the interests of public order

by reference to the remote and improbable consequence that it may possibly do so. Their Lordships are driven inexorably to the conclusion that the words in section 33B "or to undermine public confidence in the conduct of public affairs" offend against the Constitution and cannot therefore have any effect.

Their Lordships have not referred to section 33A of the Public Order Act which is concerned primarily with statements defamatory of public officials but also contains similar language to that which their Lordships have been considering in section 33B. The language is there used in a different context, no argument has been addressed to it, and their Lordships express no opinion as to its effect.

Their Lordships are very conscious that in relation to constitutional issues of the kind to which this appeal gives rise it is always appropriate to give special weight to the views of the judges in the courts below insofar as they reflect the advantage which those judges enjoy of familiarity with prevailing local conditions. In this case, however, they have not found anything in the judgments delivered in the Court of Appeal to suggest that that advantage played a significant part in the court's reasoning in support of the conclusion from which their Lordships feel constrained to differ.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal set aside, and the order of Matthew J. restored. The respondents must pay the appellant's costs in the Court of Appeal and before the Board.