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ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 5 of 1986

**BETWEEN:**

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA  
THE COMMISSIONER OF POLICE AND  
SAMUEL BARZEY ADDITIONAL MAGISTRATE DISTRICT "A"

- Appellants

and

LEONARD HECTOR - Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice  
The Honourable Mr. Justice Bishop  
The Honourable Mr. Justice Moe

Appearances: Lloyd Luckoo, Q.C., and Gary Collins for the Appellants  
Dr. F. Ramsahoye, Q.C., and S. Christian for the Respondent

1987: Feb. 24, 25,  
June 22.

JUDGMENT

ROBOTHAM, C.J.

The decision appealed

This is an appeal from a decision of Matthew J. handed down on May 7, 1986, in which he granted to Leonard Hector the respondent herein declarations and orders in the following terms:

- (1) A declaration that the constitutional rights under section 12 of the Constitution of Antigua and Barbuda (1981) have been contravened by the institution of Magisterial proceedings No. 374/85) brought by the second-named respondent (Samuel Barzey) against him, the said proceedings being a complaint under the provisions of section 33B of the Public Order Act 1972 as amended by the Public Order (Amendment) Act 1976, No. 17 of 1976.
- (2) A declaration that section 33B(b) of the Public Order Act 1972 as amended is unconstitutional to the extent of the words "or to undermine public confidence in the conduct of public affairs".

/ (3) An order.....

(3) An order that Magisterial Criminal proceedings No. 374/85 against the applicant be quashed.

Sections 12(1) and (4) of the Constitution of Antigua & Barbuda 1981 read:

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

The background

The respondent Leonard Hector is the Editor of a newspaper published in Antigua known as the Outlet.

On May 10, 1985 there appeared in an issue of that newspaper, a front page article headlined "Wife and child kidnapped in Antigua". This led to a charge being preferred against Hector, alleging that the article constituted a breach of section 33B(b) of the Public Order Act No. 9 of 1972, as amended by the Public Order Amendment Act 1976, No. 17 of 1976. The substance of the charge was the printing of false statements likely to undermine public confidence in the conduct of public affairs.

After a devious passage in the Magistrate's Courts, the respondent Hector filed a Constitutional motion in the High Court on September 24, 1985 seeking redress and relief in accordance with the provisions of section 18 of the Constitution of Antigua and Barbuda (1981) and the

/Supreme....

Supreme Court (Constitutional Redress - Antigua) Rules 1970, (No.5 of 1970).

Paragraph (b) of that motion sought "a declaration that section 33B (b) of the Public Order Act 1972, (as amended) or so much of it as relates to the charge against the applicant is unconstitutional". As the hearing before Matthew J progressed and towards the close of his submissions Counsel who then appeared for Hector indicated that what was being attacked <sup>in the section</sup> was the phrase "to undermine public confidence in the conduct of public affairs"; Counsel ended by saying "what we are asking the Court to do is to remove that part of section 33B which is the substance of the charge against Hector", under the authority of *Hinds vs The Queen* (1976) 1 All E.R. 353. The order for severance was made in the terms of (b) of the motion.

It must be emphasized therefore and made clear at the very outset that in the final analysis, it was not being contended before Matthew J that the whole of section 33B should be declared unconstitutional. The severance ordered left intact the remainder of that section.

#### The Impugned Law

The original Public Order Act No. 9 of 1972, came into force on November 29, 1972. The long title reads:- "An Act to provide for the maintenance of public order with reference to public meetings, marches and processions and for matters connected therewith and incidental thereto". The Constitution then in force was the Constitution of Antigua and Barbuda, 1967.

As time progressed, Parliament, in an attempt to cure certain deficiencies which must have appeared to that body to be manifest in the Act passed an amendment in the form of No. 17 of 1976. Section 33 was amended and two new sections 33A and 33B were added. The marginal note appearing alongside 33A reads "False statements about public officials", and I now reproduce in their entirety the two sections:

"33A. (1) Notwithstanding the provisions of any other law any person who in any public place or at any public meeting makes any false statement, concerning any public official which is calculated or is likely to bring any such person into ridicule, odium or contempt, or to undermine public confidence in the conduct of public affairs by such official, shall be guilty of an offence and shall be liable -

/(a) on.....

(a) on summary conviction to a fine not exceeding two thousand five hundred dollars or to a term of imprisonment not exceeding twelve months,

(b) on conviction on indictment to a fine not exceeding five thousand dollars or to a term of imprisonment not exceeding two years.

(2) For the purposes of subsection (1) the expression "public official" shall include the Governor, Judges of the Supreme Court, Members of Parliament, Members of the Industrial Court, Members of any Commission established by the Constitution or under any other law and public officers as defined in section 115(1) of the Constitution.

33B. 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 Appeal - Appellants' approach

The first ground of appeal argued by Counsel for the appellants was that the Judge erred in law when he admitted oral and documentary evidence in relation to the Parliamentary passage of the amendment to the Public Order Act introducing sections 33A and 33B and in allowing to be used hearsay statements in Hector's affidavit in support of the motion, contrary to the provisions of rule 5 of Order 41 of the Rules of the Supreme Court 1970. In as much however as it was pointed out that the trial Judge had found both to be of little or no evidential value, Counsel did not pursue this ground.

The main burden of the appeal was that the Judge erred in law in coming to the conclusions which he did, and particulars were given. In view of the fact that both Mr. Luckoo for the appellants and Dr. Ramsahoye for the respondent, accepted the construction placed by the Judge on the german part of section 33B it is desirable that it should now be set out. The Judge said:-

"In my judgment the phrase "undermine public confidence in the conduct of public affairs" means the wearing away or the erosion of the confidence of the public in the persons who administer the affairs of the public."

Dr. Ramsahoye added that the word *undermine* had an insidious connotation.

/Although.....

Although the Court is here only concerned with the constitutionality of certain words in section 33B it is desirable that 33A should be examined alongside it, with a view to assessing the scope and structure of the Act, and ascertaining just what evils it sought to prevent. It was the submission of Mr. Luckoo for the appellants that although there may be some areas of overlapping, separate and distinct offences were created in 33A and 33B.

Comparison of 33A and 33B

My comparison shows that both sections 33A and 33B(a) start out with the words "any person who in any public place or at any public meeting makes any false statement", but 33A limits that statement to "concerning any public official". Section 33B extends the scope by adding in 33B(b) the printing or distributing of any false statement, which makes no mention of "public official", and is not limited to a public place or at a public meeting.

The false statement in 33A must be such as is likely to bring "any such person" (i.e. public official) into ridicule, odium or contempt, or to undermine public confidence in the conduct of public affairs by such official.

The false statement contemplated in 33B(a) and (b) must be such as 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. The words "by such official" appearing in 33A are omitted. This is understandably so because 33B in its entirety does not limit the offence to public officials but is at large. It however does not exclude them. Counsel for the appellant submitted that someone must be responsible for the conduct of public affairs and that if confidence in the conduct of those affairs is being undermined, the effect must also rub off on the person or persons responsible for the conduct of such public affairs.

From the analysis of these two sections, it will be seen that there is a great deal of overlapping of their provisions.

I opine that it can hardly be disputed that they are directed towards a common purpose.

Section 33B created new offences not covered by 33A, and the statements made, printed or distributed need not be made concerning any public official, although as I have indicated, it does not exclude them,  
/if the....

if the circumstances are appropriate. The penalties under 33B are not as severe as those under 33A. From the wording of 33A it would seem that the intention of Parliament was the preservation of the interests in section 12(4) (a) (i), and the protection of the reputations, rights and freedoms of others as contemplated by section 12(4) (a) (ii), of the Constitution of Antigua & Barbuda 1981. Section 33A however does not fall under the purview of this appeal and we must confine ourselves to giving what answers are being sought in relation to 33B only.

Be that as it may, there is a basic rule of construction that where words and phrases are used in the same enactment in more than one place, then there is a presumption that they bear the same meaning unless a contrary intention appears. In this respect the words "whosoever being married shall marry....." readily springs to mind and I can see no good reason why the words "to undermine public confidence in the conduct of public affairs" which appear in both sections, should not bear a similar connotation. Having confidence, or a lack of confidence in a person is very much a state of mind.

#### Public Affairs

There is no definition available of what is public affairs but I would say that the words seem to be self-explanatory. Every Government in power, is charged with the responsibility of administering to the needs of the public at large, irrespective of their individual political affiliations. These duties are carried out by Public officials in the form of the Prime Minister and other members of his Cabinet, with the help and support of the people's representatives and in the performance of these duties, they are conducting the affairs of and concerning the public, and so public affairs.

Counsel for the appellant submitted that undermining confidence in the conduct of public affairs can be justifiable by the exercise of the right of fair comment on a matter of public interest, using facts which are true. The right he said to utter honest and reasonable criticism is a source of strength to a community rather than a weakness. However it is pernicious to indulge in the making, printing or distributing of false statements with a view to undermining public confidence in the conduct of public affairs, and that is the very evil which section 33B seeks to control.

The learned trial Judge said concerning these words:-

/"There.....

"There is nothing then which restricts the phrase to Governmental functions, and I rule that it may equally apply to other public undertakings for example the selection of a National Cricket team or the affairs pertaining to Carnival conducted by the Carnival Committee."

Counsel for the appellant suggested that this was an extended and strained meaning. I do not think however that it is as far-fetched as it may seem on the face of it because, if there was participation in either of these exercises by public officials at Governmental level and on behalf of the public it could be said to fall within the conduct of public affairs.

In any event Counsel went on to submit that whatever strained meaning may be given to the words public affairs in the scheme of 33A and 33B, (and here I prefer to quote his exact words):-

".....it would still in any event be a good law so long as it fulfills the criteria of the Constitution, and so long as the hindering of the enjoyment of freedom of expression fell within section 12(4) (a) (i) or (ii) of the Constitution, and is NOT shown NOT to be reasonably justifiable in a democratic society. The onus of establishing this last part would be on the person challenging the law."

Public Order - In the interest of

Under section 12(4) (a) (i) of the Constitution a permitted hindrance on the fundamental right of freedom of expression rests on the premise that the provision is reasonably required in the interests of defence, public safety, public order, public morality or public health. The Judge in the concluding portion of his Judgment had this to say:

"Notwithstanding the presumption of constitutionality, of the impugned legislation, from a mere perusal of the legislation in section 33B in so far as that provision relates to the charge I cannot hold that such a law is reasonably required in the interest of.....public safety, public order..... The undermining of public confidence in the conduct of public affairs as I have defined need not necessarily be proximate to any of the interests in the said section 12(4) (a) (i) and the provision is therefore excessive and arbitrary. I hold also that the words "undermining public confidence in the conduct of public affairs".....is not reasonably required for the protection of the reputation of those many persons who may be called upon to administer public affairs, nor is the legislation in so far as it relates to the words referred to above reasonably justifiable in a democratic society."

/I will.....

I will deal with the concept of public order, and leave the question of proximity for the time being.

Counsel for the appellant submitted that one must realise that the public could be stirred to disorderly reaction if their wrath is aroused, and it could lead to a breach of the peace not only in this respect, but also if their confidence in the handling of public affairs is undermined by the dissemination of false statements.

It is to be noted that the words used are not "for the maintenance of " but "in the interest of" public order. In Basu's Commentary on the Constitution of India (Fifth edition) at page 553, the learned author had this to say:

"The expression "in the interest of public order" has a wider meaning than the expression "for the maintenance of public order" and authorises the legislature to impose restrictions on utterances which have a tendency to cause public disorder.

In *Romesh Thappar v The State of Madras*, 1950 Supreme Court Reports at page 559 Sastri J. said that public order is an expression of wide connotation and signifies that state of tranquility which prevails among members of a political society, as a result of the internal regulations enforced by the government which they have established. He further went on to say that public safety is a part of the wider concept of public order.

At this point rather than attempting to elaborate on the meaning the words "in the interest of" I would prefer to quote what the learned author of Basu's Commentaries had to say on this at page 575:

"Thus a limitation imposed in the interest of public order to be a reasonable restriction should be one which had a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.

"In the interests" does not, however predicate that the Legislature can impose the restriction only where the mischief has actually taken place or is sure to take place. It can also curb tendencies to cause the mischief aimed at. From this standpoint it has been held that the expression is wider than words like "for the maintenance of". "In the interests of" authorises the Legislature to restrict an act or utterances which not only produces the mischief aimed at, e.g., breach of public order or security of the State, but also those which have a tendency to cause that effect but which may not actually lead to a breach of public order....."

/The question.....

The question of "tendency" however, has to be determined objectively, with reference to the circumstances in which the mischief sought to be suppressed is likely to take place and not in the abstract."

Counsel went on to submit that since the Constitution speaks of the restriction being "reasonably required in the interest of" the Court should not interfere unless such restriction is patently arbitrary. In this respect the Court is charged with the responsibility not only of enquiring whether the particular activity sought to be restricted has a real proximate and reasonable connection with the maintenance of public order, or public safety, but also whether the extent of the restriction imposed is more than what is necessary to meet the evil, and/or whether the means adopted is unreasonable or arbitrary.

This is the approach given by Basu at page 649, and I am in respectful agreement therewith.

Finally on this aspect of restriction "in the interest of", Counsel submitted that section 33B could also be said to be reasonably required in the interest of public safety under 12(4) (a) (i) and in the protection of the reputations and rights of others as contemplated in section 12(4)(a) (ii). Counsel for the respondent pointed out however that the latter cannot be so as the protection of reputations has been adequately provided for in section 33A. I am inclined to agree with the submission. Section 33B had the effect of widening the scope of 33A. It removed the limitation on the false statements being made concerning public officials only and brought in the written word in respect of any person. It is specific in its likely causes, and although in the final analysis it may or may not be applicable to the protection of reputations and rights, I do not consider it seemly that there should be any scratching around in an effort to bring the law under another head other than what is in fact being urged in this case.

At this point, Counsel for the appellant addressed the Court on the effect of the Judge's order for severance.

#### The effect of the severance

Counsel pointed out that the words "to undermine public confidence in the conduct of public affairs" have been left untouched in section 33A. Whatever the final decision of this Court on 33B, we have no intention of making any pronouncement on the use of those words in section 33A.

He submitted that in the severance only of the words "to undermine  
/public.....

public confidence in the conduct of public affairs", the effect of so ruling was that the other likely effects namely, to cause fear or alarm in or to the public, or to disturb the public peace were good in law and not unconstitutional.

In Counsel's own words he said:-

"The element of undermining public confidence in the conduct of public affairs, whatever meaning this Court would attribute to it, is just as good law, relating to a state of mind of the public, as a statement which is likely to cause fear or alarm in or to the public, or to disturb the public peace. Therefore if those other classes of offences are not unconstitutional and are not excessive and arbitrary, and if they are proximate to any of the other interests, either in section 12(4) (a) (i) or (ii) and are reasonably justifiable, then equally so the words to undermine public confidence in the conduct of public affairs was a class of offence equally fulfilled by those criteria. 33A has been left untouched, and in 33B, a single class has been severed.

#### The respondent's approach

In his reply Counsel for the respondent centered his argument mainly around the manner in which a Court of Appeal reviews the findings of a Judge in a Court below.

The respondent he submitted had sought redress in accordance with the protective provisions provided by section 18 of the Constitution and in so doing, it was the valued opinion of a Judge of the High Court which was being sought on the question of the constitutionality of the provisions of section 33B. There are guaranteed rights of appeal but a Court of Appeal should only interfere if there was nothing on which the decision of the trial Judge could validly be based.

In this case, if he found as indeed he did, that something was not reasonably required or justifiable, the Court should only interfere if there was no basis for so finding.

The respondent was charged with the offence in 1985 when the 1981 Constitution was in force. When the Act 17 of 1976 was passed, the Constitution then in force was the 1967 Constitution. The only difference between the two in the expression of the fundamental right to freedom of expression is the addition in the 1981 Constitution of the final words "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."

/This is....

This is quite correct.

As was pointed out to Counsel however, this provision gave an aggrieved party an additional method of attacking the validity of an imposed restriction and was therefore favourable to the respondent even though the burden of proof in respect thereof rested on him.

Counsel submitted that what section 33A did was to criminalize slander of public officials. It used words which occur again in section 33B and in such a case they have to be given the same meaning. I have earlier indicated that I hold this view. Counsel also adopted the meaning ascribed by the Judge to the words "undermining public confidence". He then pointed out that whereas 33A was concerned with public officials, 33B had nothing to do with personalities, but created 3 new limbs of criminalization.

The Judge found that the third limb of undermining of public confidence in the conduct of public affairs was unconstitutional, his reason being that it was not necessarily proximate to any of the interests allowed in section 12(4) (a).

Counsel postulated that under section 33B(b) if a person merely printed a false statement and did nothing else he would be guilty of an offence. This he said aptly demonstrated how draconian the law is. I cannot agree with this interpretation. If the purpose and object of the law was to be achieved, I cannot envisage any Court of law convicting a person charged under this section unless some evidence was led to show or lead to the inference that there was reasonable cause to believe that the printed matter was intended for the eyes of the public.

In any event, Counsel had earlier submitted that section 33B is completely impersonal and that there must be a likelihood that the paper would be seen or read - a slight inconsistency. It is he said, the public confidence in the manner in which public affairs are conducted which is the impersonal thing. It is to use his own words a mere emotive psychological reaction flowing from a subjective state of mind and not related to public order or public safety. It is not meant to cover the same situations as fear or alarm or public disorder.

I cannot but wonder at this stage if Counsel was here using the words "state of mind" in the same context as Mr. Luckoo did in his final submissions. In whatever context he used it however Dr. Ramsahoye submitted that the Judge was correct in coming to the conclusions which he did.

/The law....

The law he submitted was not necessary as already there were adequate provisions governing such situations in Antigua. He referred to two in particular, the Libel & Slander Act Cap. 47, and the Seditious and Undesirable Publications Act Cap. 75.

Counsel concluded by saying that at Common Law, it was not the falsity of the statements that was the offence. It is the tendency (his own word) to disturb public peace and good order. Thus it appears in Blackstones Commentaries Cap II, Book IV, page 150:

"The direct tendency of these libels is the breach of the public peace by stirring up the objects of them to revenge, and perhaps blood shed."

#### General observations

Absolute and unrestricted individual rights, wholly freed from any form of restraint cannot exist in a modern democratic society. As was said in the case of *Adkins v Children's Hospital* (1923) 261 U.S. 525 "The liberty of an individual to do as he pleases even in innocent matters is not absolute. It must frequently yield to the common good". Thus it is that a publisher has no more right to print what he pleases about a person, than that person has to the protection of his reputation from scurrilous attacks. Thus it is, that the enjoyment of all rights guaranteed by the Constitution must be subject to such reasonable conditions or restrictions as may be seen by the authorities in control to be essential for the general order, safety, health and peace of the State. In the State of Antigua these rights and freedoms are given in Chapter 2 of the Constitution, but even in giving those rights, section 3 is declaratory of the fact that those rights and freedoms are to be enjoyed subject to such limitations as are designed to ensure that the enjoyment of the said rights and freedoms by any individual, are not prejudicial to the rights and freedoms of others, or the public interest.

Having given these rights and freedoms, and having imposed restrictions on their exercise, the Constitution has endeavoured to provide a pivot for the striking of a balance between the competing individual rights and liberties, and also the exercise of those rights and liberties in conjunction with the interest of public order, public safety and the like.

Section 18 guarantees access to the Courts by an aggrieved person with a right of appeal to the Court of Appeal and this Court can reverse

/the order....

the order of the trial Judge, if it reaches the clear conclusion that there has been a wrongful exercise of the discretion in that ~~no~~ weight or no sufficient weight was given to relevant considerations.

(Charles Osenton & Co. v Johnston  
1941 - 2 All E.R. 245 )

From time to time and over the years various words and phrases have been used by distinguished Judges in defining this principle but they do not alter the basic rule, and we hasten to assure Dr. Ramsahoye, that we are fully cognizant thereof.

Final factors to be considered

In the final analysis it appears to me that the solution lies in the answers to be given to the following propositions, using as a starting point the acknowledged fact that the Act impugned imposes a restriction on the enjoyment of the respondent's freedom of expression as guaranteed by section 12 of the Constitution:

- (1) Is the restriction in section 33B imposed in the interest of any of the purposes set out in section 12(4) (a) (i), i.e., defence, public safety, public order, public morality or public health.
- (2) If the answer to (1) is in the affirmative is it reasonably required or is it arbitrary and excessive.
- (3) If the answer to (2) is that it is reasonably required, are the words impugned (likely) "to undermine public confidence in the conduct of public affairs" sufficiently proximate to any of the interests set out in section 12(4) (a) (i).
- (4) If the answer to 1,2,3 are all in the affirmative, has it been shown not to be reasonably justifiable in a democratic society?

(1) What is the purpose - or purposes

Dealing with this Counsel for the appellant took the view that public order and public safety went hand in hand. Counsel for the respondent tacitly agreed with this when he stated that for the purposes of this case, the purposes to be considered are "public order, public safety or both". I would agree by postulating a third position by  
/saying.....

saying that of the two, the greater, if there be one, would include the lesser.

In Romesh Thappar's case (supra) Sastri J gave his conception of the meaning of the expression public order and said that it included public safety. I will not repeat it here.

We have already seen that Counsel for the respondent submitted that what sections 33A and 33B did was to criminalize the law of slander and libel. I have already mentioned that Blackstone's views were that the direct tendency of these criminal libels was to lead to a breach of the peace.

Lush J in *Holbrook* (1878) 4 Q.B.D. 42 at page 46 said that libel is ranked among criminal offences because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace.

Basu at page 626 wrote:

"Anything that disturbs public tranquility disturbs peace..... The test of the offence is whether the writing is likely to arouse communal passions, and that is to be determined from the language used, and the atmosphere in which it is published."

This Court is not here concerned with the words used or printed by the respondent which formed the substance of the criminal charge against him. We are only considering whether the State of Antigua had the right to impose the restrictions contained in section 33B in the interest of public order and/or safety and in so far as the respondent was affected thereby.

We have already seen that "in the interest of" is sufficiently wide to enable the Legislature to curb tendencies to a breach of the peace. I would think that the provisions of section 33B would have been directed towards this purpose.

Taking all factors into consideration, I would say that the restriction imposed in section 33B can be said to be in the interest of primarily, public order and also of public safety. Every State has the undoubted right to take what steps it considers necessary for the preservation of peace, stability, tranquility, good order and safety within its boundaries. In his book *Fundamental Rights and Constitutional Remedies*, (Second Edition) the learned author V.G.Ramachandran had this to say at page 49: (The setting is India).

/"An order....

"An order.....preventing disturbance of public tranquility is quite intra vires of Article 19(2) and (3). (Freedom of speech). The term "in the interests of public order" gets within its sweep "public tranquility" as the former is inconceivable without the latter. Whatever is done for preventing disturbance of "public tranquility" must be regarded as done for preventing disturbance of the "public order" and hence in the interests of "public order".

I would therefore answer question (1) in the affirmative and say that the restriction has been imposed in the interest of public order and public safety in accordance with section 12(4) (a) (i) of the Constitution.

(2) Is it reasonable

Much of what has been said under (1) is applicable hereto. In determining substantive reasonableness, the Court should take into consideration many and varied factors. These include factors such as the nature of the right alleged to have been infringed the purpose underlying the restriction, and the scope of the evil it seeks to remedy. It will be unreasonable if it is unnecessarily harsh or arbitrary, or if it overreaches the scope of what it was intended to achieve. Whatever these various factors may be however, we start out with the presumption of constitutionality.

In Attorney General and Another vs Antigua Times Ltd. (1975) 3 All E.R. 81 - P.C., the Antigua Times Ltd. being the publisher of a newspaper in Antigua, sought declarations that two Acts passed in Antigua contravened section 10(1) of the Constitution of Antigua 1967 by hindering them in the enjoyment of their freedom of expression, since it made their right to publish newspapers subject to the payment of an annual fee of \$600 and the payment of \$10,000 by way of deposit, to satisfy any judgment for libel.

Section 10(1) of the 1967 Constitution is <sup>in</sup> substance in the same terms as section 12(1) and (2) of the 1968 Constitution. Lord Fraser in delivering the unanimous decision of the Board said at b, page 90:

"In some cases it may be possible for a Court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to the question. In such cases has evidence to be brought before the Court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume until the

/contrary.....

contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the Statutory provisions in question are to use the word of Louisy J "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect the direct execution of a different and forbidden power."

He then went on to say:

"If the amount of the licence fee was so manifestly excessive as to lead to the conclusion that the real purpose of its imposition was not the raising of revenue but the preventing of the publication of newspapers, then that would justify the conclusion that the law was not reasonably required for the "raising of revenue"."

No one here could suggest that the purpose of the Act No.17 of 1976 was to prevent the respondent from publishing his newspaper. Rather it can be said to be a restriction on publication whether by spoken or written word, of false statements which are likely to disrupt the State of public tranquility within the borders of Antigua and Barbuda.

I would also answer (2) in the affirmative, on the basis that it satisfies the test of reasonableness, and cannot be considered arbitrary or excessive.

(3) Is it proximate

Before the words impugned can be said to relate to any of the grounds of the limitations in section 12(4) (a) (i) they must be proximate and rational. This has to be viewed not only from a general standpoint, but from that predicated by the use of the words "in the interest of". Once proximity can be established, a Court ought not to interfere except the means by which the enforcement of the restriction is sought is patently arbitrary, or draconian in the words of Dr. Ramsahoye.

A law can be reasonable in general terms, but not proximate in its relationship with the restriction. More often than not however, they are inter-related as indeed are the four questions posed for answers.

In the Concise Oxford Dictionary "Proximate" is defined as nearest, next, before or after (in place, order, time, connection of thought etc.). Section 33B, speaks of three likely causes:

- (a) fear or alarm, in or to the public
- (b) disturbance of the public peace
- (c) undermining public confidence in the conduct of public affairs.

/Mr. Lucko.....

Mr. Luckoo for the appellant had submitted that all these likely causes relate to a state of mind. Dr. Ramsahoye for the respondent submitted that if only loss of confidence is caused, that is a subjective state of mind not related to public order or public safety. What is foremost in my mind is that he virtually conceded that it did relate to a state of mind as submitted by Mr. Luckoo.

I am of the view that all three do in fact relate to a state of mind, from which consequences disruptive of public order or public safety could flow. It is not difficult to conceive a given situation which could produce any of the causes mentioned in the section, or all three, or a combination of any two. I am of the opinion that the force of the Judge's finding that the words "or to undermine public confidence in the conduct of public affairs" was not necessarily proximate to any of the interests in section 12(4) (a) (i) and therefore severable, was completely eroded by the fact that they each clearly referred to a state of mind, not conducive to a situation of public peace and tranquility.

I therefore also answer (3) in the affirmative.

(4) Reasonably justifiable or not

The wording of the last three lines of section 12 of the 1968 Constitution are "except so far as that provision.....is shown not to be reasonably justifiable in a democratic society". This did not appear in the 1967 Constitution. The effect of this is that although all the questions 1-3 are answered in the affirmative, if it could be shown that the law was not reasonably justifiable the motion would succeed. The burden of proof however rests in this case on the respondent.

Counsel for the respondent had submitted that there were other laws capable of dealing with the situation contemplated by section 33B and he named in particular the Libel and Slander Act Chapter 47, and the Sedition and Undesirable Publications Act Chapter 75. It is true that there may be related laws on the Statute Books of Antigua, but this does not and cannot inhibit Parliament from enacting other laws which they consider necessary and reasonable in the interest of peace, order and good government.

As far as the Civil Laws are concerned, they are slanted towards compensation and damages and as Lord Fraser said in the Antigua Times case, (supra) unless there is a reasonable prospect of an injured person obtaining the damages awarded to him, he might be deterred from instituting civil proceedings.

/I do.....

I do not consider that the burden of proof here has been discharged, and I would answer question (4) in the negative.

The questions posed having been thus answered, I have reached the clear conclusion that the learned trial Judge fell into error in making the findings which he did. In my opinion section 33B is not unconstitutional.

It follows that for the reasons which I have given I would allow the appeal, set aside the declarations and orders made by the trial Judge which are set out at the commencement of this Judgment, and dismiss the motion brought by the respondent. I would also order that the respondent do pay the costs of the appellants in this Court and the Court below, fit for 2 Counsel, such costs to be taxed if not agreed.

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L.L. ROOTHAM,  
Chief Justice

Bishop, J.A.,

I have had the privilege of reading the Judgment of the learned President earlier. I agree that the determination of this appeal is met by answering the four questions stated. I would therefore allow this appeal, dismiss the motion and make a like order as to costs.

*I would also answer them as they were answered in this Judgment.*

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E.H.A. BISHOP,  
Justice of Appeal

I agree.

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G.C.R. MOE,  
Justice of Appeal