FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE L.R. 3/79.

No. 1,836 of 18th OCTOBER, 1979.

LAW REPORTS

Note: These Reports are cited thus —
(1979) Gib. L.R.

ATTORNEY GENERAL v. GOMEZ and others

Supreme Court
Spry, C.J.
3 July 1979

Crime — contempt of court — imputation of political bias to magistrate
Practice and procedure (Criminal) — contempt of court — whether summary procedure obsolete — RSC Ord. 52, r.2.
Constitutional law — fundamental rights and freedoms — freedom of expression — The Constitution, s.10.

The Attorney General applied under RSC Ord. 52, r.2, for the committal of the first respondent and for an order for costs against all three respondents for contempt of court. The proceedings arose out of a "press release" and a picture with a caption, which were published together in a local newspaper. The first respondent was the editor of the paper and the other respondents the proprietor and publisher and the printer respectively. The Attorney General claimed that the effect of the publication was to scandalize the magistrates' court by imputing political bias to the stipendiary magistrate. For the respondents, it was argued that the publication was within the bounds of legitimate criticism and only imputed a bias that inevitably sprang from upbringing and surroundings.

HELD: (i) The summary procedure subsists but should only be used in very special circumstances.

(ii) The freedom of expression protected by s.10 of The Constitution is no wider than that under the pre-existing common law.

(iii) The publication imputed a deliberate act victimizing an individual as part of a campaign against a political party and as such was a serious contempt.

(iv) Mens rea is not essential to contempt of court.

Cases referred to in the order

R. v. Gray [1900] 2 Q.B. 36
R. v. Editor of the New Statesman (1928) 44 T.L.R. 301
McLeod v. St. Aubyn [1899] A.C. 549
Ambard v. Attorney General for Trinidad and Tobago [1936] A.C. 322
The King v. Nicholls [1911] 12 C.L.R. 280
Attorney General v. Blomfield [1913] N.Z.L.R. 545
Re Bronowski (1971) 3 C.C.C. 402
Attorney General v. Times Newspapers Ltd. [1974] A.C. 273
R. v. Metropolitan Police Commissioner, ex p. Blackburn (No. 2) [1968] 2 All E.R. 319
R. v. Odhams Press Ltd, ex p. Attorney General [1956] 3 All E.R. 494
Attorney General v. Butterworth [1962] A.C. 696

Application

This was an application for summary committal for contempt of court.

The Attorney-General (D .Hull) with him C. Finch, applicant
J. E. Triay for the 1st and 2nd respondents
A. B. Serfaty for the 3rd respondent

6 July 1979: The following order was delivered—

This is an application brought by the learned Attorney General under RSC Ord. 52, r.2. It seeks the committal of the first respondent for contempt of court and for an order for costs against all three respondents.

The alleged contempt is the publication of an article and a picture with a caption in the issue of Gibraltar Libre for 4 June 1979. The first respondent is the editor, the second respondent is the proprietor and publisher and the third respondent the printer of that paper.

The article is expressed to be a press release by the Central Committee of a political party known as Partido Socialista de Gibraltar (PSG). The relevant parts are the expression of an

opinion that the imprisonment of one Alfred Olivero, the party's president, was not divorced from a concerted drive against PSG by other political parties, the police and military intelligence. It quotes Olivero as having said in court that he knew he had been "tried for my political and trade union beliefs." The Central Committee went on to associate itself with "criticisms already made of Magistrate Alcantara's statements comparing trade unionists to drunkards or hooligans."

I interpose here that Olivero had been convicted on counts alleging the use of threatening words and of assaulting a police officer acting in the execution of his duty.

To return to the alleged contempt, the picture was a reproduction of an election advertisement issued in 1956, showing pictures of four candidates for the AACR party, including the present Chief Minister, another Minister and the Stipendiary Magistrate, Mr. Alcantara. Above it was the caption "Every picture tells a story".

In the statement in support of the application, made pursuant to r.2(2), it was alleged that the article, the picture and the caption were together calculated to bring the magistrates' court and the stipendiary magistrate into contempt or to lower the authority of the court or otherwise to scandalise the court and the stipendiary magistrate in that they imputed political bias to the stipendiary magistrate in the adjudication of criminal proceedings before him in the magistrates' court.

At the very end of the day, Mr. J. E. Triay, who appeared for the first two respondents, submitted that the Attorney General, in the course of the hearing, had gone beyond the case as contained in the statement. All I need say on this is that I shall treat the case against the respondents as limited by the statement.

The case presented by the Attorney General was quite simply that the publication carried the imputation that the magistrate had been associated with the governing political party and that this had affected the discharge of his functions in criminal proceedings. He submitted that this was a clear and serious contempt of court. He placed much reliance on *Reg. v. Gray* (1). That was a case of scurrilous abuse of a judge in his conduct while trying a case, published after the conclusion of the case.

(1) [1900] 2 Q.B. 36.

Mr. Hull also cited *R. v. Editor of the New Statesman* (1), a case in which the writer of an article expressed the opinion that persons holding certain views could not apparently hope for a fair hearing in a court presided over by a certain named judge. A Divisional Court held that this statement imputed unfairness and lack of impartiality to a judge in the discharge of his judicial duties and constituted a contempt.

Mr. Triay did not argue that this court lacks the power summarily to commit, but he submitted that it is a power that should be used most sparingly, and not in the present case, where he claimed, if there had been a contempt, it was hardly more than a technical one. He cited *McLeod v. St. Aubyn* (2), in which Lord Morris, delivering the judgment of the Judicial Committee, said

> "The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice."

Again, in *Ambard v. Attorney General for Trinidad and Tobago* (3), Lord Atkin, delivering the judgment of the Judicial Committee, after quoting a dictum that judges and courts are open to criticism in the form of reasonable argument or expostulation, said—

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of

(1) (1928) 44 T.L.R. 301.
(2) [1899] A.C. 549, at p. 561.
(3) [1936] A.C. 322, at p. 335.

> criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even thought outspoken, comments of ordinary men."

Later, he went on to observe that in these matters the Press is in exactly the same position as any ordinary member of the public.

I am indebted to Mr. Triay for drawing my attention also to three cases from Commonwealth countries. *The King v. Nicholls* (1) was a case decided by the High Court of Australia. An article in a newspaper had suggested that a judge owed his appointment to his services to a political party and would not allow any reflection on those responsible for his appointment. A motion for committal was dismissed. Griffith, C.J., in delivering the judgment of the court, said—

> "In one sense, no doubt, every defamatory publication concerning a Judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a Judge calculated to bring him into contempt in that sense amounts to contempt of Court."

Later, he said—

> "I am not prepared to accede to the proposition that an imputation of want of impartiality to a Judge is necessarily a contempt of Court"

provided it was a fair comment.

Attorney General v. Blomfield (2), a case in the Supreme Court of New Zealand, heard before a full bench of the Court in Wellington, concerned scandalous cartoons of a Judge, published after the hearing of a divorce suit, reflecting on his conduct of the proceedings. The majority of the court held that the publication was not calculated to interfere with the due administration of justice. Two dicta may be noted. Williams, J., remarked that

> "If a Judge so conducts himself at a trial as to suggest undue bias in favour of one party or the other the public are at liberty to say so."

(1) [1911] 12 C.L.R. 280.
(2) [1913] N.Z. L.R. 545.

He went on to say that in such circumstances it should be possible to bring forward evidence in justification and said

> "That has never been done and cannot be done in summary proceedings for contempt. The Court does not sit to try the conduct of the Judge."

He concluded that the summary jurisdiction should only be used in extreme cases.

Denniston, J., in a strongly worded judgment said that

> "You cannot compel public respect for the administration of justice by flouting public opinion. Judges, like all other public men, must rely upon their own conduct to inspire respect."

He took the view that the procedure was obsolete.

Finally, there is a Canadian case, *Re Bronowski* (1)

With respect, I do not think it takes the matter any further and it contains dicta with which I am unable to concur.

I share Mr. Triay's opinion that the court has jurisdiction but that it is a jurisdiction that should be used only in very special circumstances.

Mr. Triay claimed that the law has been changing over the years and that society today allows a far greater freedom of discussion on all manner of subjects, including the deficiencies of the judiciary, than would have been permitted in an earlier age. He sought to reinforce this argument by reference to a book which is not, so far as I am aware, either authoritative or admissible as evidence. However, that is not important because I accept the general proposition and I think it is within the judicial notice of the court.

Mr. Triay referred to section 10 of the Constitution of Gibraltar, which protects freedom of expression and refers to what is reasonably justifiable in a democratic society. I do not, with

(1) (1971) 3 C.C.C. 402.

respect, think the freedom of expression it protects is any wider than the pre-existing freedom of expression at common law.

Mr. Triay and Mr. Serfaty, who appeared for the third respondent, also relied on various articles that have been published in England without, apparently, any action having been taken against the authors or publishers. Except for one limited purpose, to which I shall come later, I do not think the fact that no action was taken on these publications should be given much weight because, as Lord Reid said, in *Attorney General v. Times Newspapers Ltd.* (1)

> "the Attorney General is not obliged to bring before the court every prima facie case of contempt reported to him. It is entirely for him to judge whether it is in the public interest that he should act."

Mr. Triay, cited *R. v. Metropolitan Police Commissioner, ex p. Blackburn (No. 2)* (2) as showing that even very vigorous criticism, containing errors of fact, will not be treated as contempt if it is made in good faith and is reasonable. I accept, with respect, everything said in the three judgments of the Court of Appeal, but the case is very different from the present one, because the criticism there was of the courts as a whole and referred to a "blindness which sometimes descends on the best of judges." There was not the slightest suggestion of impropriety, or bias, or lack of impartiality in anyone.

Mr. Triay also referred to *Attorney General v. Times Newspapers Ltd.* (supra). That case, although it contains most valuable guidance on contempt of court generally, is not of great assistance here, because it was concerned with conduct prior to or during the course of legal proceedings. Lord Diplock made a passing reference (3) to 'the rare offence of scandalising the court after judgment." Lord Simon of Glaisdale enlarged a little on this. He spoke of the balance between the two public interests, freedom of discussion and the administration of justice. After saying that legal proceedings should progress without interference, he went on (4)

> "But once the proceedings are concluded, the remit is withdrawn, and the balance of public interest shifts. It is

(1) [1974] A.C. 273, at p. 293. (3) At p. 309.
(2) [1968] 2 All E.R. 319. (4) At p. 320.

> true that the pan holding the administration of justice is not entirely cleared. The judge must go on to try other cases, so the court must not be scandalised...But...the paramount interest of the public now is that it should be fully apprised of what has happened...and hear unhampered debate on whether the law, procedure and institutions which it had ordained have operated satisfactorily or call for modification."

Mr. Triay argued that there is here no scurrilous abuse and that the allegation is not one of impropriety but of unconscious bias resulting from upbringing and experience. He referred to an affidavit sworn by the first respondent. In this, the dependent said that he agreed to the publication because of his opinion that the judicial system must necessarily reflect the policies of the system under which it operates. He thought it was more difficult for the judiciary to remain independent in Gibraltar because the community is so small and close. He believed that two sentences passed by the magistrate were excessive and he believed that this was due to an over-reaction to certain incidents that had occurred and to prejudice against PSG. He believed that certain remarks passed by the magistrate indicated that before dealing with the case of Olivero, the magistrate had already singled him out as the person, or one of the persons, who were responsible for the trouble and because he is the President of PSG. He stated that no suggestion of dishonesty or impropriety was contained or implied in the publication, which was only criticising "the confined limits of impartiality which are endemic in a small, highly political society and to offer such criticism as an explanation of a sentence that seemed unduly harsh."

Mr. Triay stressed that it was unconscious bias that was alleged. With the greatest respect, I do not think this is a valid argument. Had the newspaper contained a reasoned argument that the severity of the sentence passed (assuming that it was severe) was attributable in part to unconscious bias on the part of the magistrate, as a natural consequence of his political background, I do not think any contempt would have been committed, whether the criticism was justified or not. But it seems to me that this argument cannot be sustained if the publication is examined analytically. It begins with a reference to a concerted

drive against the PSG. It then links the imprisonment of Olivero with that drive. If it had stopped there, a possible interpretation would have been that the "drive" inspired the prosecution. But the publication goes on to make an attack on the magistrate, which cannot be isolated from the earlier reference, in the same paragraph, to a concerted drive. "Concerted" must import an element of premeditation and planning. It is, in my opinion, the key word.

Furthermore, the statement that the imprisonment of Olivero was connected with the concerted drive goes on, in the same sentence, to say that the drive has been aided at one time or another by other political parties. Below the statement appears the picture, dating from 1956, showing the magistrate as an active politician, with the words "Every picture tells a story."

It seems to me that there is only one possible inference to be drawn: that the magistrate was a party to the "concerted drive" and that the sentence he imposed was influenced by his political views. I cannot avoid the conclusion that that was the intention of the writer and it follows that I do not believe his affidavit. It is a serious contempt. It is perfectly legitimate to argue, after a case is finished, that the decision was wrong or in the case of a criminal prosecution that the sentence passed was too severe, provided it is done fairly and temperately but it is not permissible to allege, unlesss it can be fully substantiated, that it was a deliberate act victimising an individual as part of a campaign against a political party.

I have given much thought to the question whether the summary jurisdiction is appropriate to the present case. I have come to the conclusion that it is. It is not a case that calls for viva voce evidence. On my view of the publication, I think it goes far beyond the limits of freedom of expression. It is certainly not a mere technical offence.

As regards punishment, I think there is one mitigating circumstance. I think the remarks passed by the magistrate and quoted in the first respondent's affidavit may have misled the first respondent. I do not think they necessarily bear the meaning the first respondent has put on them and, of course, the magistrate has not been and could not have been asked, in proceedings of this nature, what he intended. In the earlier cases, he expressed the opinion that the defendants had been led by

others; when he sentenced Olivero, he reverted to those remarks and said he believed Olivero to be one of the prime movers. It does not follow that the magistrate had Olivero in mind when he passed the earlier sentences, as the first respondent alleges.

In all the circumstances, I do not think a prison sentence is called for. Instead, I shall impose a fine.

As regards costs, Mr. Serfaty argued that mens rea ought to be regarded as an essential element in the offence of contempt of court and he claimed that the third respondent, through its printing manager, had acted in good faith. Mr. Serfaty conceded that the leading authority, *R. v. Odham's Press Ltd., ex p. Attorney General* (1) is against him. In that case, Lord Goddard, C.J., giving the judgment of a Divisional Court, said

> "These cases clearly show that lack of intention or knowledge is no excuse, though it may have a great bearing on the punishment which the court will inflict and in our opinion they dispose of the argument that mens rea must be present to constitute a contempt of which the court will take cognisance and punish. The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors or printers intended that result..."

I note in passing that that was a case of contempt during the pendency of proceedings but I do not think that is a ground on which the case can properly be distinguished so far as concerns the statement of law I have quoted.

Mr. Serfaty argued, however, that I should follow the judgment of Lord Denning, M.R., in *Attorney General v. Butterworth* (2) in which he referred to the *Odhams Press* case and, without going so far as to say that it was wrongly decided, expressed his opinion that contempt of court, like all criminal offences, "requires in general a guilty mind." He also said that the decision had been reversed by s. 11 (1) of the Administration of Justice Act, 1960, a provision which has no equivalent in the law of Gibraltar. Mr. Serfaty suggested that s.2A of the Criminal Offences Ordinance, introduced by Ord. No. 5 of 1972, has the same

(1) [1956] 3 All E.R. 494.
(2) [1962] A.C. 696, at p. 722.

effect, but with respect I cannot agree. Reverting to *Butterworth's* case, Donovan, L.J., appears to have upheld the decision in the *Odhams Press* case, while explaining that in the peculiar circumstances of *Butterworth's* case, it was necessary to examine the motives of the respondents in order to determine the likely effect of what they had done. Pearson, L.J., was silent on the point. In my opinion, the decision in the Odham's case has not been overruled and while it is not technically binding on me, I do not think I ought to depart from it. It is interesting to note that it was referred to in argument in *Attorney General v. Times Newspapers* Ltd. (supra) but their Lordships made no comment on it.

Accordingly, all three respondents are condemned in costs.