IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA

185

Special Consideration

M.6/79

REGINA

v.

FINBAR KENNY
JAMES JOSEPH WARNELL LITTLE
COOK ISLANDS DEVELOPMENT COMPANY
AND OTHERS

Hearing: 12 March 1979

Counsel: R. L. Maclaren, with N. L. A. Barlow, for Messrs. Kenny and Little and the Cook Islands Development Company

C. M. Turner (in person)

M. C. Mitchell (Advocate General)

Judgment: 17 April 1979

JUDGMENT OF BEATTIE J.

This is a motion for an order directing attachment for contempt in respect of a publication styled "Cook Islands Politics - The Inside Story" published in New Zealand by the Polynesian Press, Auckland, in association with the South Pacific Social Sciences Association.

Before dealing with the question of the jurisdiction of the High Court of the Cook Islands to punish alleged sub judice contempts it is necessary to refer to the affidavit of James Joseph Warnell Little of Arorangi, Rarotonga, company director. Mr. Little is one of several accused including Mr. Kenny and the Cook Islands Development Company, charged with the offence of conspiring with each other and others to defraud Her Majesty the Queen by participating in a scheme whereby public money was used for private purposes. The subject matter of the charges which, of course, are

criminal charges, has already been under judicial inquiry before Sir Gaven Donne C.J. in respect of bribery petitions before the Electoral Court of the Cook Islands. I refer particularly to the determination of Donne C.J. dated 24th July 1978 when in a detailed judgment His Honour found that public moneys to the extent of $337,000 being revenue of the Philatelic Bureau was requested and used by the then prevailing government to finance aspects of its party's re-election campaign by flying in voters from New Zealand. The Court dismissed the Government and directed the Registrar to hand the whole of the evidence and exhibits to the Superintendent of Police for consideration. The Judge made it clear it would be a matter solely for the police in consultation with their legal advisers to decide whether to launch prosecutions under s.69 of the Electoral Act 1966, under the Public Moneys Act 1969, or under any other relevant Cook Islands statute. After an interlude of some seven months, informations were laid against the present accused and others. On 12th December 1978 Mr. Little was served with informations in respect of the conspiracy charges and other charges which required his appearance before the High Court on 12th December. In company with several other accused he appeared and the proceedings were adjourned until Monday 12th March 1979 when, after hearing counsel, I adjourned the charges until 18th June 1979. Also on 12th March 1979 I heard and granted an application for extradition proceedings against Mr. Finbar Kenny who resides in the United States of America. The affidavits and exhibits in support of that application can only be described as voluminous. Following the conclusion of these matters Mr. Maclaren sought and was granted permission to have this motion considered by the High Court. In support of Mr. Maclaren's oral submissions, Mr. Barlow furnished to the Court a long, detailed written submission.

I also heard from another accused, Mr. Turner, who appeared in person, and from the Advocate General, Mr. Mitchell. It was therefore necessary for me to take time to consider the matters raised.

Mr. Little deposes that within two weeks of his appearance on 12th December 1978 he was advised that the publication "Cook Islands Politics - The Inside Story" had been distributed and was selling very quickly throughout Rarotonga. His wife purchased a copy of the book, and I have now read it. The deponent claims that he was very upset by the allegations against Mr. Kenny and himself, particularly those that concerned personal character, and his first reaction was to sue the publishers for defamation. In this regard he consulted Auckland solicitors whose advice was that the book was in contempt of Court and that the matter must immediately be referred to the Advocate General of the Cook Islands before other civil action could be taken. Accordingly, a long letter of some nine pages, dated 30th January 1979, was sent to the Advocate General complaining about the publication of the book and requesting that action be taken against the publishers and principal contributors to remedy the damage caused in respect of the criminal proceedings against Mr. Little, Mr. Kenny, and other accused. It is appropriate to quote certain parts of that letter. After giving the background, which I have already mentioned earlier in this judgment, Mr. Barlow continued:

> "The allegations, in brief, against our clients are that they by fraudulent means participated in a scheme to misappropriate public money for the private purpose of financing aspects of the government's re-election campaign. That, then, is the allegation and it is strenuously denied by our clients. In law the allegations, as unproved charges, are still in issue and are to be the subject of judicial enquiry and determination. Our clients have been charged, not convicted. The Electoral Court has found that public money was used for private purposes but made no, and of course was not competent to make, findings concerning the issue of criminal responsibility for this misappropriation.

You will understand therefore our serious concern that last week or earlier, both in New Zealand and throughout the jurisdiction within which our clients are required to stand trial, a 268 page book, produced with full colour cover and eight pages of photographs on glossy stock, presented as a professional study coordinated with the University of South Pacific, was published and distributed which presents as factual conclusions matters that are unequivocally in issue in the conspiracy proceedings laid against our clients. We would refer you in particular to the following extracts:

> In Chapter 5 at page 49 under the title 'Nepotism' the following statement is made:
>
> 'Mr F Kenny, the American stamp dealer with government granted monopoly rights on the Cook Islands Philatelic and Numismatic interests, advanced most of the money used by the Cook Islands Party in this election from stamp revenues.'

The unequivocal implication of this statement is that Mr Kenny (who is not a stamp dealer by profession) is said to have advanced money from 'stamp revenues', which of course is public money, for the Cook Islands Party election campaign, which is of course a private purpose. This is exactly what the charges against our clients allege but we hardly need emphasise the fact that these are only unproved charges and certainly not convictions.

This statement constitutes a publication contemporaneous with the criminal conspiracy proceedings of facts which have not yet been heard let alone determined by the High Court of the Cook Islands. It is equivalent to saying that Mr Kenny is guilty of the charges brought against him in respect of which the Court has not yet heard a tittle of evidence.

> In Chapter 1 on page 10 under the title 'Self Government and the New Colonialism' this statement is made:
>
> 'Perhaps the worst decision was to give the monopoly on our Philatelic and Numismatic industry to an American stamp dealer. That enterprise became the main source of funds used by the Cook Islands party.'

The inescapable suggestion here once again is that our client, whose 'enterprise became the main source of funds used by the Cook Islands party' assisted in the misappropriation of public moneys from stamp revenues for the private use of the Cook Islands party. Our client resolutely denies this suggestion and his defence, which he is now gravely impeded in his capacity to present, has been pre-judged the other way by the publishers of this book and the Cook Islands reading public from whom the jury is to be drawn to try the matter.

In addition to this blatant pre-judgment of the most important factual issue in the proceedings against our

clients, the book contains a number of uncompromising attacks on the character of both Mr Kenny and Mr Little. In this connection we would refer you to the following extracts:

> In Chapter 25 page 246, 'The Saga of Tension' by the principal authors, Ron and Marjorie Grocombe, a report is given of a demonstration that was organised by the current government party following the previous election. There can of course be no complaint about this. The matter is not left at that, however. The authors then go on to reproduce in the book direct quotes of the statements written on the protest placards which directly attack the character of our client and expressly allege that he has either bribed, or attempted to bribe, the Cook Islands government. The statements read:
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> 'Puppet government for an American stamp dealer'
>
> 'Finbar go home; we are not bought yet'

While we cannot deny the rights of demonstrators to express their political opinions, the reproduction of these placard statements, an extraordinary source of information in a book which purports to present an independent academic analysis of the political situation in the Cook Islands, at a time when charges against Mr Kenny are pending in the High Court, is a grossly improper act quite apart from the fact that the allegation is quite untrue and entirely unsupported by any related charges. As a respected advisor to many governments throughout the world, and without a blemish to his character, our client has been maliciously and deceitfully smeared by this libellous and criminal publication.

A similar attack is mounted against Mr Little who is also of excellent character, having a background of distinguished service for the External Affairs Department of the New Zealand Government and a reputation for fairness and honesty second to none in the Cook Islands. Upon the request of the Chief Judge, Mr G Donne, Mr Little accepted an unpaid appointment as a Commissioner to the High Court and has since discharged his functions in an exemplary manner that has brought only praise and support from those who have appeared before him. Mr Little applied for and was granted leave of absence when the bribery petition proceedings at which he gave evidence were commenced, but still remained an officer of the High Court. One can sympathise with his anger and disbelief to read the following statement in chapter 5 on page 49 of the book, also by Ron Grocombe under the heading 'Nepotism':

> 'Mr James Little, the Manager of Mr Kenny's operation in the Cook Islands was appointed shortly before that as the only private (and part-time) Commissioner of the High Court. A Commissioner is a Magistrate with power to hear routine cases, including electoral matters. Since the elections

he was given the power of a Judge of the Land Court as well. As justice should not only be done but also appear to be done, it seems to be injudicious to say the least, to have appointed Mr Little in these capacities'.

The malice of the author is barely disguised in this statement. The attack purports to be on the public propriety of the appointment of the Manager of the Philatelic Bureau to these judicial positions. But it cannot and is not designed to leave the matter at that. The implication is that Mr Little, by virtue of his employment by the Bureau, itself a branch of Government, was unfit to be seen to be appointed as a Commissioner. This unavoidably raises the question as to the propriety of Mr Little's activities at the Bureau and is once again an attack, albeit indirect, upon the character of a person against whom criminal proceedings in the High Court have been laid. Worse than this, the statement by its reference to the Court's powers to hear 'electoral matters' creates an innuendo that Mr Little would not be true to his oath and would abuse his position as Commissioner to further his business interests. What possible point could there have otherwise been in particularising this matter? It is a thinly disguised attack on the character of a man who has no blemish to his reputation but is now required to stand trial before a jury of people who have been exposed to this baseless and deceitful attack on his character.

Another matter of grave concern is the contribution by Mr I Short, a practising solicitor in Rarotonga and member of the current government cabinet, which deals at length with the findings of the Electoral Court in the bribery petition hearings and presents an unbalanced selective summary of the Court's judgment. Of particular importance is the emphasis given to the hearsay evidence of Mr Kingi that the March 1978 Bureau advance, found by the Electoral Court to be a pre-payment of government sales revenue, was to be 'recoup(ed) from a special coin issue' (see page 238). The origin of this finding was a story Sir Albert Henry had apparently told to a Mr Kingi who in turn recited this hearsay information in Court. Yet a statement on this matter extracted from the Court's judgment was published without explanation and for a statement which implies participation in criminal corruption and bribery on the part of Mr Kenny, with such a fragile evidenciary basis, surely called for some qualification to the effect that this was hearsay evidence originating from Sir Albert Henry, whose evidence was otherwise entirely discredited by the same Court. This is the danger of course in selective quotations and the result is that our client has had to contend with another attack on his character whilst facing charges concerning precisely the same matters. While we appreciate that complaint cannot be made about the unbiased re-publication of Court documents, we would also suggest that selective publications must be

> made with the greatest responsibility and fairness and that patently has not been the case in the present situation. Apart from this, the findings in the Electoral Court are made according to a lower standard of proof than in a Criminal Court but Mr Short's contribution contains no mention of this, which is the very least one would expect of a legally trained Minister of the Crown who takes it upon himself to publish statements damaging to the character of a person standing trial in the same jurisdiction. As is made clear by Mr Short in the concluding passages of his contribution, he was aware of the imminence of criminal charges at the time of writing and yet still lent his name, and unavoidably the authority of his position in the community, to this publication and, more disturbingly, declined to withdraw his contribution when the charges were actually publicly filed with the Court. The prejudice caused to our client's position by an attack from such a source is of course enormous."

The principal contributors referred to were Professor and Mrs. Ron Crocombe, who are persons who have a residence in Rarotonga. In this letter Mr. Barlow, in very great detail, sets out the allegations complained of and draws the Advocate General's attention to the law on the subject of contempt. Two replies, dated 12th and 16th February 1979 were received from the Advocate General. In his first letter Mr. Mitchell mentioned that the book was not published in the Cook Islands and the publishers do not reside in that country although some of the contributors do. He was also concerned as to whether an injunction was available and that the solicitors for Mr. Little could be assured that the Advocate General's office would take all steps within its power to ensure that those charged receive a fair trial. The second letter read as follows:

> "Further to my letter of 12th February I advise that I have now read the book, and make the following observations:
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> 1. where a criminal trial follows upon a civil trial the inevitable comment on the latter must, to some extent, amount to comment on the former.
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> 2. dealing with the first passage you refer to (Chap. 5 p. 49) 'Mr F. Kenny ... advanced most of the money used by the Cook Islands Party ...' In my

view, after reading the Petitions Judgment, it seems to be a proven fact that the monies used for the Charter flights came from your client's organisation. Surely the point is whether or not Mr Kenny knew of the purpose for which the advance was made?

3. The same observation applies to the second passage you quote from Chapter 1 page 10.
4. I don't agree that the placard writings fall into the category of contempt.
5. so far as the extract referring to Mr Little is concerned (Chapter 5, p. 49) I do not regard this passage as falling within the kind of remarks usually regarded as being in contempt.
6. the Chapter written by Mr Short, seems to this office to be a comment on the Judgement in the petitions case.
7. I am not in a position to comment on the figures contained in paragraph 2 of page 5 of your letter. So far as I am aware, the accounts of the Bureau have never been subjected to a 'government Audit'.

I am grateful to you for bringing these matters to my attention. However, I am not inclined to initiate contempt proceedings."

Mr. Little states that the publication of this book has caused a great deal of discussion in the community: he says that it has acted as an enormously divisive force as it has opened the old political issues that arose in the bribery petition hearing and made a number of libellous attacks on many Cook Islanders. As mentioned in Mr. Barlow' letter, Mr. Little has held office as a Commissioner in the High Court and the Land Court of the Cook Islands and says he has always enjoyed an excellent reputation among the people of these islands on both sides of the political spectrum. He mentions that Mr. Kenny is a respected international philatelic adviser to some forty governments throughout the world, has never had a blemish to his character, and has made a number of substantial financial contributions to the people of the Cook Islands. He states that since the philatelic bureau was commenced Mr. Kenny has never drawn any personal income from local funds but left the money in the islands

for reinvestment into local projects operated by local people. He states that the whole exercise has been a charity one by Mr. Kenny, that has brought enormous benefits to the people of the Cook Islands including an annual income of $1.2 million which constitutes approximately one-seventh of the annual national income of the Government.

The question I have to decide is, assuming there is jurisdiction, should I direct the Advocate General to take proceedings for contempt in the face of his refusal and, if appropriate, direct him to apply for an injunction against further sales of the book.

Looking at the book I find that Professor Crocombe, in a foreword, describes it as controversial, presenting a range of viewpoints on various aspects of the political process in the Cook Islands. He states that Cook Islanders asked him to write a book about politics and the elections pointing out that politics had "gone wrong", that this was the most important election held in the Cooks, and that it "had to be" recorded. Professor Crocombe's reply to them was that he agreed, but that the people should write it. As a result, twenty-two authors contributed chapters which were accepted for publication and were presented in the book. Almost all the authors are indigenous Cook Islanders, and the others are long-term residents eligible to vote in the Cook Islands. It is stated that publication of the book was delayed by the election petitions before the High Court, but almost all the chapters were written and edited before the Court's decision. Professor Crocombe states that it is a credit to the authors that almost none wanted to make any changes as a result of the Court decision except on points of tense and of

fact. The twenty-two authors' names are as follows: Trevor Clarke, Marjorie Crocombe, Ron Crocombe, Tom Davis, Norman George, Louise Graham, Hugh Henry, Teariki Jacob, John Jonassen, Tereapii Kingan, Graeme Kitto, Ted Libby, Marii Mahutariki, Ngereteina Puna, Iaveta Short, Mana Strickland, Kato Tama, Michael Tavioni, Makiuti Tongia, Anthony Utanga, Nihi Vini, Joseph Williams. Dr. Davis is the present Premier. Professor Crocombe is Professor of Pacific Studies and Director of the Institute of Pacific Studies at the University of the South Pacific. Mrs. Crocombe was stated to be Co-ordinator of Continuing Education for the University of the South Pacific. Norman George was a former Cook Islands policeman before migrating to New Zealand. Mrs. Graham is a daughter of Sir Albert Henry, former Premier. Hugh Henry is a son of Sir Albert Henry and at the time of publication was Head of the Ministry of Supportive Services. Teariki Jacob was Secretary of Justice at the time of writing. I mention these persons without all the others to show that there was a cross-section of political persuasion amongst the authors.

Put succinctly, the case in support of the motion before me was that the publication of the book within a few days of the public filing of charges against the accused pursuant to s.280 of the Crimes Act 1969, is in contempt of the Court on two grounds. First, because it pre-judges factual matters in issue and yet to be determined by the Court; and secondly, it attacks the character of the accused, Kenny and Little, and by implication the officers of the accused company, the Cook Islands Development Company, in a manner that would not be permissible at the actual trial. It is claimed that these matters constitute sub judice contempts.

<u>Jurisdiction to punish sub judice contempts</u>: A contempt of the High Court is defined in s.148 of the Cook Islands Act 1915. That section reads:

> "Every person is guilty of contempt of the High Court who -
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> (a) Disobeys any judgment or order of that Court, or of any Judge thereof, otherwise than by making default in the payment of a sum of money (other than a penalty) payable under such judgment or order; or
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> (b) Uses any abusive, insulting, offensive, or threatening words or behaviour in the presence or hearing of the Court; or
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> (c) Assaults, resists, or obstructs, or incites any other person to assault, resist, or obstruct, any constable or officer of the Court in serving any process of the Court, or executing any warrant of the Court or a Judge thereof, or executing any judgment or order of the Court or of a Judge thereof; or
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> (d) By any words or behaviour obstructs in any manner the proper and orderly administration of justice in the Court; or
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> (e) Does any other thing which elsewhere in this Act or in any other Act is declared to be a contempt of the High Court; or
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> (f) Aids, abets, counsels, procures, or incites any other person to commit contempt of the High Court."

I refer particularly to s.148(e). Section 174 of the Cook Islands Act 1915 is an example of enforcements of judgments of the Supreme Court of New Zealand by the High Court of the Cook Islands by way of proceedings for contempt. Section 413 of the Cook Islands Crimes Act 1969 is an example of contempt: ss. (1) and (2) thereof purely relate to contempt in the face of the Court itself, such as assaulting or threatening a Judge or a juror or a witness. Subsection (3) thereof reads:

> "(3) Nothing in this section shall limit or affect any power or authority of the Court to punish any person for contempt of Court in any case to which this section does not apply."

Counsel submitted that sub judice contempts arising out of criminal proceedings fall into this category as they have been

recognised as punishable contempts in all common law jurisdictions, especially England (Halsbury's Laws of England Vol. 9 4th Edn. para. 9, p.8: see R. v. Payne (1896) 1 Q.B. 577). But I consider that the High Court has power under its inherent jurisdiction as a superior Court of record to punish a sub judice contempt. See s.47 of the Cook Islands Constitution Act 1964 which establishes the High Court as a Court of record. Section 82(1) of the Constitution Act reads:

> "(1) The High Court of the Cook Islands established by Article 47 hereof is hereby declared to be the same Court as the High Court of the Cook Islands established by the Cook Islands Act 1915."

It is only then necessary to refer to s.616 of the Cook Islands Act 1915 which states:

> "For the purposes of the last preceding section /that section refers to the law of England as in the year 1840 to be in force in the Cook Islands/ all rules of common law or equity relating to the jurisdiction of the superior Courts of common law and of equity in England shall be construed as relating to the jurisdiction of the High Court of the Cook Islands."

It is clear that as a Court of record the High Court is in the same position as the Supreme Court of New Zealand. I refer to the decision in Attorney-General v. Taylor & Another (1975) N.Z.L.R. 138 where at p.147 I said:

> "Therefore, on the topic of the inherent jurisdiction which arises from the nature of this Court as a superior Court of record, I say the origin, purpose and justification of the Courts to punish contempt is the prevention of interference with the administration of justice."

It is undoubted that in 1840 the inherent power to punish sub judice contempt was part of the English law and I am satisfied that jurisdiction has been carefully protected and carried forward from English law into New Zealand law and thence into the Cook Islands law.

I turn to consider whether the High Court has jurisdiction

to make an order directing the attachment for contempt of the publishers and editors of the book in question by virtue of the fact that the publisher's address is in Auckland, New Zealand. Returning to s.413(3) of the Crimes Act 1969 (Cook Islands), that represents the preservation of the inherent jurisdiction of the Court to punish sub judice contempts. I next refer to ss. 4, 5 and 6 of the Cook Islands Crimes Act 1969:

> "4. Application of Act - (1) This Act applies to all offences for which the offender may be proceeded against and tried in the Cook Islands.
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> (2) This Act applies to all acts done or omitted in the Cook Islands.
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> 5. Persons not to be tried in respect of things done outside the Cook Islands - Subject to the provisions of section 6 of this Act, no act done or omitted outside the Cook Islands is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment.
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> 6. Place of commission of offence - For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in the Cook Islands, the offence shall be deemed to be committed in the Cook Islands, whether the person charged with the offence was in the Cook Islands or not at the time of the act, omission, or event."

The equivalent New Zealand section to s.5 is s.6 of the Crimes Act 1961. The learned author Adams in Criminal Law and Practice in New Zealand 2nd Edn. p.51 comments:

> "It is submitted that the meaning of the final clause is, '... unless the doing or omission of the act outside New Zealand is an offence ...'. There must be express provision for extraterritorial application."

The general rule of common law, still applicable except where modified by statute, is that criminal jurisdiction is exercisable in respect of acts done within the territory. This applies both to British subjects and to aliens. While it is accepted that some crimes can be punishable by the Court if committed within or outside New Zealand, for example, treason, it seems clear to

me from the authorities that the New Zealand publishers are not within the jurisdiction of the High Court of the Cook Islands for the purposes of attachment for sub judice contempt.

But that is not the end of the matter. In R. v. Griffiths Ex parte Attorney-General (1957) 2 Q.B. 192, the distributors of an American magazine were held liable for contempt. Lord Goddard C.J. at 204 said:

> "We shall impose a fine ... to emphasize the risk which is run by dealing in foreign publications imported here but which have no responsible editor or manager in this country. The distributors are the only persons who can in these circumstances be made amenable in the courts of this country."

Again, in R. v. Bryan (1954) 3 D.L.R. 631 McRuer C.J., dealing with magazines published in the United States of America containing lurid articles in story form about the alleged murder of a deceased girl being prejudicial to the accused, found jurisdiction as the foreign corporations appeared by counsel. The Judge did comment, however, that how the fines would be collected may present another problem. He also committed the local distributor to gaol and said, at 640:

> "If the local distributor is not to be held responsible in such cases I doubt if there is anyone within the jurisdiction of this Court that can be held responsible in the absence of an appearance before the Court of the foreign distributor or the foreign publishers. Our power to reach those abroad is a very limited one and we cannot abrogate the right of the accused to the protection the law gives him by a distributor merely saying: 'I import the offensive material from abroad. I do not look at it. I put it into circulation and therefore I should be blameless.'"

I also refer to Re Oullet (No. 1) 67 D.L.R. (3d) 74.

It will be observed that the motion does not stipulate which of the editors or contributors should be committed for contempt. The submissions from counsel seek to attach "the major contributcrs". In my opinion the motion should have been more specific and named the people sought to be attached because

contempt is a serious allegation. In addressing me, Mr. Maclaren was good enough to say that no real punishment was sought but prompt action was required so that potential jurors would stop being influenced by the publication as the sum total of the book and particularly the chapters written by Professor Crocombe go beyond the bounds of reasonable criticism and lack objectivity and factual accuracy. I was invited to read the book and to come to the conclusion that overall the comments in it tended to interfere with the proper administration of justice in the Cook Islands.

Everyone agrees that it is necessary to prevent interference with the administration of justice in both civil and criminal proceedings. The balancing factor is vital. Investigative journalism, as demonstrated in the Watergate affair in the United States of America, can play a major part in exposing questionable commercial and business activities or indeed corruption whether in high places or in business circles. One object of bringing contempt proceedings is to uphold the due administration of justice and in particular to protect the right to a fair trial. It is unnecessary to show that a publication has actually prejudiced a case: what matters is whether it presents a risk of prejudice by impairing the impartiality of the jury which will try the case. As Jordan C.J. said in Ex Parte Terrill; Re Consolidated Press Ltd. (1937) N.S.W. State Reports 255 at 257:

> "There are certain cases in which it is regarded as of such importance in the public interest that information should be placed at the disposal of the public that it is legitimate to publish it notwithstanding that there may be a likelihood that some prejudice may be thereby caused to a party to a legal proceeding: Lewis v. Levy E.B. & E. 537 at pp. 557-9; R. v. Gray 8 T.R. 293 at p.298; R. v. Evening News (1925) 2 K.B. 158 at 167-8.
>
> As a general rule all Courts must be open to the public. It is a principle of the utmost importance in the administration of justice that the liberty or rights of the subject should not be adjudicated upon by tribunals

> sitting in secret and behind closed doors: Scott v. Scott (1913) A.C. 417; McPherson v. McPherson (1936) A.C. 177. Not all the public can obtain admission to the public sittings of the Courts, and therefore those who do are at liberty to communicate to the public generally an account of the proceedings which they have witnessed. So long as any account so published is fair and accurate and is published in good faith and without malice no one can complain that its publication is defamatory of him notwithstanding that it may in fact have injured his reputation, and no one can in general be heard to say that it is a contempt of Court notwithstanding that it may in fact be likely to create prejudice against a party to civil or criminal litigation. This applies to preliminary inquiries by a magistrate where such inquiries are held in open Court: Lewis v. Levy."

Again, in R. v. Kray & Others (1969) 53 Cr.App.Rep. 412 Lawton J. giving a preliminary ruling on a challenge of jurors for cause could find no reason why a newspaper should not report what happens in Court even though there may be other charges pending. Reference was also made to Attorney-General v. Times Newspaper Ltd. (1973) 3 All E.R. 54. In his speech in the House of Lords, Lord Reid said at 59:

> "I agree with your Lordships that the Attorney-General has a right to bring before the court any matter which he thinks may amount to contempt of court and which he considers should in the public interest be brought before the court. The party aggrieved has the right to bring before the court any matter which he alleges amounts to contempt but he has no duty to do so. So if the party aggrieved failed to take action either because of expense or because he thought it better not to do so, very serious contempt might escape punishment if the Attorney-General had no right to act. But 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."

I consider that the Advocate General when looking at this matter objectively, and as a matter of the integrity that goes with his office, would be considering the issue of the public interest with complete impartiality. He informed me in open Court that as a matter of public interest he decided not to authorize the proceeding, and that while accepting there was some cause for

concern he answered the correspondence on the basis of taking no action. Overall, it could be said the comment complained of was fair comment on the electoral petition case and the questions of good faith of those responsible for the contributions was not demonstrated to be at fault. The Court generally discourages applications for contempt where the risk of prejudice is slight or where the applicant does not seriously press for punishment of the contemnors. I find this matter to be in that category and not of such a nature as to require the arbitrary and summary interference of the Court. I do not consider on the face of them the excerpts are calculated to prejudice the proper trial of the accused. I do not find the book was specifically written for the purpose of these trials nor was it specially timed to have that effect. When I read the extracts complained of and measure them against the judgment of Donne C.J. I find I am in agreement with the Advocate General that the comment is mainly comment on the judgment of the electoral petitions case. Always in issue in criminal trials is the question of mens rea (guilty mind) of the accused and that remains at large for determination before a Judge or a Judge and a jury.

I refuse the application.

SOLICITORS:

Messrs. Martelli McKegg Wells & Cormack of Auckland for applicant