IBRAHIM
V
NADARAJAH

SUPREME COURT
AMERASINGHE, J.
DHEERARATNE, J. &
GOONEWARDENE, J.
S.C. APPEAL : 46/86
L.A. NO. : 58/86
C.A. NO. : 440/79
D.C. MT. LAVINIA: 1006/L
DECEMBER 12, 1990

Supreme Court Rules - Leave to appeal - Failure to comply with Rules 4 and 28 of the Supreme Court Rules 1978 - Naming of party respondent.

Held:

A failure to comply with the requirements of Rules 4 and 28 of the Supreme Court Rules 1978 is necessarily fatal.

Per Amerasinghe, J.

"It has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected".

Cases referred to:

1. *Ibrahim* v. *Beebee et al* (1916) 19 NLR 289
2. *Ammal et al* v. *Mohideen et al* (1933) 34 NLR 442
3. *Wickremasooriya* v. *Rajalias de Silva* (1937) 8 CLW 29
4. *Seelananda* v. *Rajapaksa* (1938) 11 CLW 36
5. *Sinnan Chettiar and others* v. *Mohideen* (1939) 15 CLW 47
6. *Swarishamy* v. *Thelenis et al* (1952) 54 NLR 282
7. *Tambiah* v. *Sangarajah* (1937) 39 NLR 282
8. *Avichchy Chettiar* v. *Perera* (1937) 40 NLR 65
9. *Ramasamy Chettiar* v. *Mohamadu Lebbe Marikar* (1937) 7 CLW 64
10. *Francina Fernando* v. *Kaiya Fernando and others* (1957) 7 CLW 133.

S. Mahenthiran for the substituted defendant - respondent - appellant.

P.A.D. Samarasekera, P.C. with *Keerthi Guanwardena* for 1st substituted plaintiff - appellant - respondent.

PRELIMINARY OBJECTION to appeal

Cur. adv. vult.

January 06, 1991.

AMERASINGHE, J.

When this case was taken up for argument Mr. Samarasekera, P.C. submitted that since the appellant had failed to make the second substituted plaintiff-appellant in the Court of Appeal a party respondent in the appeal to this Court, there was a violation of Rules 4 and 28 of the Supreme Court Rules, 1978 and that the appeal ought therefore to be dismissed.

Rule 4 states as follows:

> "Every application for Special Leave to Appeal shall name as respondent, . . . in the case of a civil cause or matter, the party or parties in whose favour the judgment complained against has been delivered or adversely to whom the application is preferred or whose interest may be adversely affected by the success of the appeal and shall set out in full the address of such respondents."

Mr. Mahenthiran argued that since leave to appeal had already been granted, no objection could be taken on account of the failure to name a respondent once leave to appeal has been granted.

The granting of leave to appeal only determines the question of access to Court and does not confer any advantages or exemptions on the appellant except this: Although ordinarily in terms of Rule 27 all appeals to the Supreme Court must be upon a petition in that behalf lodged by the appellant, where leave to appeal is granted, Rule 12 makes it unnecessary for the appellant to file a fresh petition of appeal. The application for leave to appeal is deemed to be the petition of appeal. A petition of appeal, whether actual or deemed, however, must in terms of Rule 28 name as respondents all parties in whose favour the judgment appealed against has been delivered and all parties whose interests may be adversely affected by the success of the appeal together with their full addresses.

Mr. Mahenthiran, however, submits that the Rules of the Supreme Court are directory and not mandatory and that the failure to comply with them is not necessarily fatal. It is not necessary for me in this case to consider so wide a proposition. I am of the opinion, however, that a failure to comply with the requirements of Rules 4 and 28 of the Supreme Court is necessarily fatal. Those Rules are meant to ensure that all parties who may be prejudicially affected by the result of an appeal should be made parties. How else could justice between the parties be ensured? It has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected. (See *Ibrahim* v. *Beebee et al* (1) *Ammal et al* v. *Mohideen et al* [2]; *Wickremasooriya* v. *Rajalias de Silva* [3]; *Seelananda* v. *Rajapakse* [4]; *Sinnan Chettiar and Others* v. *Mohideen* [5] ; *Swarishamy* v. *Thelenis et al* [6])

Mr. Mahenthiran submits that the party who was not added in this case was the minor daughter of the respondent who was named and that no prejudice will be caused because the same Counsel might have appeared for the daughter had she been made a party to the appeal and that in any event the decision against the daughter will be the same as that against her mother. I am unable to agree with this argument. The question is not whether the same Counsel might have appeared for the party who was not added or that the fate of the mother and daughter will be similar but whether the decision of this Court might adversely affect the interests of a person who is not made a party.

Finally, Mr. Mahenthiran submitted that if it appeared to the Court that any person who was a party to the action in the Courts below and who had not been made a party to the appeal, as interested in the result of the appeal, the Court may adjourn the hearing to a future date and direct that such a person be made a respondent.

That was done by the Court in the exercise of its discretionary power in terms of section 770 of the Civil Procedure Code when some good excuse was given for non-joinder or when it was not very apparent that the parties not joined might be affected by the appeal, or where the defect was not of an obvious character which could not reasonably have been foreseen and avoided. (E.g. See *Ibrahim* v.

Beebee et al, supra; *Tambiah v. Sangarajah* [7] *Avichchy Chettiar v. Perera* [8]; *Ramasamy Chettiar v. Mohamadu Lebbe Marikar* [9]; *Francina Fernando v. Kaiya Fernando and others* [10].

Mr. Samarasekera, P.C., however, submits that the Court no longer has that discretion under the prevailing laws and rules and that in any event there are no circumstances in this case warranting the granting of any indulgence. We are in agreement with him.

For the reasons stated the appeal is dismissed with costs.

DHEERARATNE, J. - I agree

GOONEWARDENE, J. - I agree

Appeal dismissed.

RE GARUMUNIGE TILAKARATNE

SUPREME COURT
FERNANDO, J.
AMERASINGHE, J. AND
DHEERARATNE, J.
S.C. RULE 1 OF 1990
JANUARY 25, 1991.

Contempt - Art. 105 (3) of the Constitution - News item contributed by reporter - Imputation pre-judging result of pending inquiry by Supreme Court into petition challenging Presidential election - Meaning of words - "Causing publication" - Reporter's responsibilities - "Intention to publish" - Effect of words in context of speaker, place, occasion and place of publication - punishment.

The respondent, a reporter of the Divaina newspaper, sent a report of a speech made by a Member of Parliament, at a party political meeting. The report was published almost verbatim. The M.P. was reported as stating that the pending inquiry by the Supreme Court into a petition filed by the leader of his party had already been decided and that if the petitioner was not successful, that would be an end of justice in the country.

Upon a Rule being issued by the Supreme Court in the exercise of its jurisdiction under Article 105 (3) of the Constitution to punish contempts of Court, the respondent pleaded "not guilty" on the following grounds:

(1) that the words were harmless and did not constitute an act of contempt;
(2) that the words, having been uttered by a politician at a political meeting, would not have been taken seriously by the readers;
(3) that the article having been published on the second page amidst advertisements would not have had a serious effect;
(4) that he did not cause the publication, the responsibility for publication being that of the editor, who had already accepted liability and had been punished for contempt;
(5) that he did not intend to publish the statement or to be disrespectful to the Court or bring it into disrepute or to obstruct the Petitioner's case.

Held:

(1) The words constituted an act of contempt.

Per Fernando, J: "The "clear implication" of the statement that if the petitioner did not obtain the relief prayed for that would be the end of justice, is that "if the Court thought differently . . .that decision would be so unreasonable or perverse as to be a travesty of justice. The statement as a whole therefore not only usurps the function of the Court, but is calculated to compel or influence the Court to reject the respondent's case even before it is heard: it seeks to exert pressure on the Court to come to a decision favourable to one party and tends to affect witnesses who may be called to give evidence in future. It is calculated to obstruct or interfere with the due course of justice . . ."

Per Amerasinghe, J: "The statement in question is an act of contempt because it involves an interference, or a likely interference, with the due administration of justice, both in the particular case of the election petition, by interfering with potential witnesses and by attempting to coerce the judges and, more generally, as a continuing process by suggesting that the Judges were prejudiced, and thereby constitutes a challenge to the fundamental supremacy of the law..... .. " what imputation, including any implication or inference, is conveyed by any particular words is to be determined by an objective test, that is by the meaning in which responsible readers of ordinary intelligence, with an ordinary man's general knowledge and experience of worldly affairs, would understand them, unfettered by any strict rules of construction. . ." "The rule against prejudgment operates even though there may be no risk of prejudice in the particular case because it is likely to produce escalating, unfavourable reactions in others." "It is not permissible for anyone to pre-judge issues in pending causes and thereby venture to supplant the authority of courts . . .To permit others to arrogate to themselves, the right to adjudicate upon matters that are before a court of law would be to place the very structure of ordered life, which depends upon the pacific settlements of law by courts of law, in jeopardy." "The law of contempt does not prevent the publication of genuine criticism and comment . . .I am of the view that the article in question is way beyond the permitted limits of comment. . ."

(2) Although the context in which the words in question are relevant, including who the speaker was, they were not harmless in the circumstances of this case.

Per Fernando,J: "With regard to learned President's Counsel's submission that,

since the statement had been expressly attributed to the speaker who was a Member of Parliament, "the average reader" would "attach no value to it". "Undoubtedly the personality or position of the speaker, and the occasion on which he speaks, may be of some relevance; considerable licence may perhaps be extended to those in the position of a Court jester of old, or of tender years, or mentally deficient persons, since the effect of their statements on the public would be minimal . . ." (I am not prepared) "to take judicial notice . . . that the public of Sri Lanka or the readers of the Divaina consider politicians or any other category of persons to be either intrinsically untruthful or unreliable, or worthy of credit. Apart from Parliamentary privilege, politicians have no greater freedom of speech, and are subject to no less stringent restrictions thereon in regard to contempt of Court, than other citizens."

Per Amerasinghe, J: "I agree . . .that, upon the application of the *de minimis* principle, there can be no contempt of which a court would take cognizance if the obstruction or prejudice is not real but, rather, trifling, far fetched, remote or merely theoretical and in that sense technical . . .As far as I can ascertain, there is nothing in the decided cases supporting the proposition that, merely because a statement comes from a politician at a political meeting, the *de minimis* principle should become automatically applicable. I am reluctant to accept the invitation to relegate the speeches of all politicians made at all political meetings to such a lowly position."

(3) The fact that the article appeared on the second page of the Daivina was of no significance.

Per Fernando, J: "The argument that the news item was published on the second page and would, despite its prominent headline, have escaped the attention of the average reader must be mentioned only to be rejected; that is at most only a mitigating circumstance . . ."

Per Amerasinghe, J: ". . . This may be a mitigating circumstance. But even on the second page, it did present a real risk of prejudice . . ."

(4) Although the editor had accepted full responsibility and had been convicted of the offence of contempt, the respondent, as reporter, "caused" the publication and was, therefore, also liable.

Per Fernando, J: "The reporter who initiated the offending item is an essential link in the chain of causation, and cannot be regarded as too remote a cause. He causes the publication no less than the contributor of an article, subject to an exception in regard to reporters who play only a subordinate and mechanical role . . ." (having drawn a distinction based on Borrie & Lowe's three types of reporters, His Lordship held that ". . .Here the news item, apart from the headline, is substantially the same as the report submitted by him and he is responsible for the finished product: that responsibility is not diminished by reason of a few finishing touches put by the editorial blue pencil. During the preceding year, he was not paid for submitting 250 reports, but only for what was published. He therefore caused the publication of the offending report".

Per Amerasinghe, J: "True enough, in the preceding year, only 35 of the 250 reports submitted by him had been made use of by the newspaper. Yet, the respondent's

offending report, albeit one of the exceptional pieces he turned out, was actually published in the newspaper. The reporter in this case did much more than supply information: He was the author of the article and in every sense he was a party to the publication . . .The activities of the respondent may not have been the cause of the contempt, but at least it was a concurrent cause. His activity in this case, no less than that of the editor completed the causal explanation in the action in question . . .The action of the editor in deciding to publish the report of the respondent did not break the causal explanation . . ."

(5) The fact that the respondent did not intend the publication or its meaning and consequences was of no avail. The respondent did intend the publication.

Per Fernando, and Amerasinghe, JJ; on the facts of the case that the respondent did intend the publication of the report.

Fernando, J held that although "intention to publish is a necessary ingredient,". yet, "To establish a charge of contempt it is not necessary to prove that the respondent intended a particular meaning or effect . . ."

Per Amerasinghe, J: "A person is not guilty of the offence of contempt unless there was *mens rea* with respect to each material element of the offence . . .". With regard to publication, this means that the respondent desired the publication or that he was "heedless of the risk that publication was highly probable, or, having regard to his past experience that some of his contributions were published, that publication was a reasonable probability." With regard to the meaning and effect of the words, "it is not sufficient for a respondent to establish that he had no intention to scandalize or to interfere with the course of justice if it is established as a fact or inferred from the circumstances that his conduct was an antecedent but for which the result in question could not have occurred and that he foresaw or ought on account of his position to have foreseen that the result was at least a reasonable possibility . . . The respondent had no intention to prejudice the court or to obstruct or impede the administration of justice . . .he did not know that the statement he prepared might bring about the consequences which in fact were brought about by the statement. However, I hold that as a newspaper reporter with certain responsibilities, the respondent ought, but failed, to have had the foresight to see that his report was likely to cause prejudice to the Court and the administration of justice as a continuing process. The respondent is, therefore, liable."

(6) The Rule was made absolute but no punishment was imposed.

Per Fernando, J: "Considering the serious nature of the offence and that the law on this point has long been settled and is free of doubt, it is a matter for regret that the respondent did not even at the close of the argument, acknowledge his offence and tender an apology. However, as the editor had already accepted full responsibility, and considering the Respondent's indigent circumstances, we refrained from imposing any punishment."

Per Amerasinghe, J: "It is because the protection of the due administration of justice and not the advancement of the interests of the Judges is the law of contempt that an apology to the Judges is irrelevant and of no avail in deciding whether the *actus reus* of the offence has been established." The absence of an apology would certainly be "noticed". But is the apology made merely because the respondent is reduced to a situation of fear and humility? "Having regard to

the fact that Contempt of Court is an offence purely *sui generis* and one that is vaguely defined; and taking account of the fact that the cognizance of the offence involves in this case an exceptional interference with the fundamental right of freedom of speech and expression, including publication . . .and considering the fact that the respondent did not have the consequences of his act as a conscious object of his conduct; and considering that, although as a reporter he had duties and responsibilities, yet his role in the publication was a comparatively subordinate one, no punishment is imposed on the respondent."

Cases referred to:

1. *Re Armand de Souza* (1914) 18 N.L.R 33, 38, 41, 45, 47
2. *Re Hulugalle* (1936) 39 N.L.R. 294, 303, 308 in fin.
3. *Hewamanne V.De Silva* (1983) 1 Sri LR 1 34, 79, 107, 110, 111, 134 et. seg. 41 156 - 161.
4. *R.V. Evening Standard* (1954) 1 Q B 578 (1954) 1 All E.R. 1026.
5. *R.V. Griffiths en P.A* - (1957) 2 Q B 192, 202, 203.
6. *R.V. Odhams Press Ltd. ex. P.A* - G. (1957) 1 Q.B 73, 80 (1956) 3 All E.R. 494.
7. *R. V. Grey* (1900) 2 Q.B. 36
8. *Reginald Perera* V *The King* (1951) 52 N.L.R. 293 (P.C). (1951) A.C. 482.
9. *St. James Evening Post Case* (1742) 2 At. K. 469, 471.
10. *Ex. P. Jones* 1806 13 Ves. 237, 239.
11. *Mcleod* V. *St. Aubyn* (1899) A.C. 549.
12. Abdul Wahab V *A.J. Perera* (1936) 39 N.L.R. 475, 476.
13. *A.G. Larapathy* V. *M.de Mel* (1936) 6 C.L.W 148.
14. *Jayasinghe* V. *Wijesinghe* (1938) 40 N.L.R. 68, 71.
15. *Re Ratnayake* (1938) 40 N.L.R. 99.
16. *Veeraswamy* V. *Stewart* (1941) 42 N.L.R. 481, 482.
17. *A.G.* V. *Vaikunthavasan* (1951) 53 N.L.R. 558, 564, 655.
18. *R* V. *Peiris* (1964) 68 N.L.R. 372, 373, 374.
19. *Re S.A. Wickremasinghe* (1954) 55 N.L.R. 511, 512, 513.
20. *Miller* V. *Knox* (1878) 4 Bing. N.C. 589.
21. *Re Clement, Republic of Costa Rica* V. *Erlanger* (1876) 46 L.J. Ch. 375, 385.
22. *In re Maria Annie Davies* (1888) 21 Q.B.D. 236, 239.
23. *Greenwood* V *The Leather - Shod Wheel Co. Ltd.* (1898) 14 T.L.R. 241.
24. *R* V *Almon* (1765) Wilmot's Notes 243, 270, Wilmots Notes 97 E.R. 94.
25. *Kandaluwe Sumangala* V. *Mapitigama Dharmadutha et. al* (1908) 11 N.L.R 195, 201.
26. *R* V. *Davison* (1821) 4 B & A 329, 333, 335.
27. *In re Johnson* (1887) 20 Q.B.D. 68, 74.
28. *Johnson* V. *Lyrant* (1923) 3 S.C. 789, 790.
29. *A.G.* V. *Times Newspapers* 1974 A.C. 273, 298, 301, 302, 304, 309, 322, 323.
30. *A.G.* V. *Leveller Magazine Ltd.* (1979) A.C. 440, 459.
31. *Ex parte Fernandez* (1861) 30 C.B.N.S. 3, 56 - 57; 1861 30 L.J.C.P. 321, 332.
32. *Rex* V. *Clarke* (1910) 103 L.T. 636.
33. *In re Jayatilaka* (1961) 63 N.L.R. 282, 288.
34. *In re Ragupathy* (1945) 46 N.L.R. 297, 298, 299.
35. *R.* V. *Lady Lawley* (1730) 2 Str. 904.
36. *R.* V. *Hall* (1776) 2 W. Bl. 1110.
37. *R.* V. *Steventon* (1802) 2 East 362.
38. *R.* V. *Loughran* (1839) 1 C & D. 79.
39. *R* V. *Talley* (1875) 82 C.C.C. 518

40. *Lewis* V. *James* (1887) 3 T.L.R. 527
41. *R.* V. *Gray* (1803) 23 N.Z.L.R. 52.
42. *Spurrell* V. *De Rechberg* (1895) 11 T.L.R. 313.
43. *Littler* V. *Thomson* (1939) 2 Beav 129, 131.
44. *Schering Chemicals Ltd.,* V. *Falkman Ltd. and others* (1981) 2 all E.R. 321, 339, 348.
45. *Vidyasagara* V. *The Queen* 1963 A.C. 589 (1963) 65 N.L.R. 25 (P.C.)
46. *New Statesman Case* (1928) 44 T.L.R. 301.
47. *R.* V. *Duffy, Ex P Rash* (1960) 2 Q.B. 188.
48. *Attorney-General* V. *B.B.C.* (1981) A.C. 303, 342.
49. *Vine Products* V. *Green* (1965) 3 W.L.R. 791.
50. *Davies, ex P. Delbert Evans* (1945) 1 K.B. 442.
51. *Attorney-General* V. *B.B.C.* (1981) A.C. 303, 335.
52. *Hunt* V. *Clarke* (1889) 58 L.J.Q.B. 490, 492.
53. *In re Pall Mall Gazette, Jones* V. *Flower* (1894) 11 T.L.R 122.
54. *Grimwade* V. *Cheque Bank Ltd.* (1897) 13 T.L.R. 305.
55. *R.* V. *Tibbits* (1902) 1 K.B. 77.
56. *Birmingham Vinegar Brewery* V. *Henry* (1894) 10 T.L.R 586.
57. *R.* V. *Parke* (1903) 2 K.B 4 32, 436, 437.
58. *In re Finance Union* (1895) 11 T.L 167.
59. *In re Tyrone Election Petition* (1873) Jr. R. 7 C.L 242.
60. *In re Montgomery Election Petition* (1892) 9 T.L.R. 93.
61. *In re Pontefract Election Petition* (1893) 9 T.L.R 430.
62. *Ambard* V. *Attorney-General for Trinidad and Tobago* (1936) A.C. 322, 335.
63. *Metropolitan Police Commissioner, ex p. Blackburn* (1968) 2 Q.B 150, 155.
64. Re *F.A. Capper and A.A. Capper Proprietor and Publisher of Times of Ceylon* (1896) Browne 317, 319.
65. *Chambers* V. *Hudson Dodsworth & Co.* (1936) 2 K.B. 595.
66. *Carl-Zeiss Stiftung* V *Rayner & Keeler Ltd.,* (1960) 1 W.L.R 1145.
67. *A.G. (N.S.W)* V. *John Fairfax & Sons Ltd.,* (1980) 1 N.S.W.L.R 362, 367.
68. *In the matter of the Rule on Armand de Souza* (1914) 18 N.L.R. 41, 45, 47.
69. *Anon.* (1731) 2 Barn. K.B. 53.
70. *Powis* V. *Hunter* (1832) 2 L.J Ch-31.
71. *Mathews* V. *Smith* 1844 3 Hare 331.
72. *In re General Exchange Bank.* (1866) 12 Jur. (N.S.) 465.
73. *In re London Flower Co. Ltd.,* (1868) 17 L.T. 636.
74. *Vernon* V. *Vernon* (1870) 40 L.J. Ch. 118.
75. *Buenos Ayres Gas Co.* V. *Wilde* (1880) 42 L.T. 657.
76. *Metropolitan Music Hall* V. *Lake* (1889) 58 L.J. Ch. 513.
77. *Lawrence* V. *Ambery* (1891) 91 L.T. Jo. 230.
78. *In re. Rochester Election Petition* (1892) Times Dec. 9.
79. *In re Evening News and Post* (1892) Dec. 9.
80. *In re Martindale* (1894) 3 Ch. 193.
81. *In re. Carlain Newspapers, Duncan* V. *Sparling* (1894) 10 T.L.R. 353.
82. *Ex Parte Josfer* (1894) Times, February 5.
83. *In re E. Wilson Gates* (1895) 11 T.L.R. 204.
84. *Kelly & Co.* V. *Pole* (1895) 11 T.L.R. 405.
85. *Fielden* V. *Sweeting* (1895) 11 T.L.R. 534.
86. *R.* V. *Payne and Cooper* (1986) 1 Q B. 577.
87. *Fairclough* V. *Manchester Ship Canal Co.* (1896) 13 T.L.R. 56.
88. *In re Hooley, ex p. Hooley* (1899) 79 L.T. 706.
89. *Shaw* V. *India Rubber Co. Ltd.* (1900) 44 Sol. Jo. 295.

90. *In re New Gold Coast Exploration Co.* (1901) 1 Ch. 860.
91. *Phillips* V. *Hess* (1902) 18 T.L.R. 400.
92. *In re Marquis Townshend* (1906) 22 T.L.R. 341.
93. *R.* V. *Daily Mail* (1907) Times, Jan. 15.
94. *Ex* P. *Starck* (1910) Times, Feb. 10.
95. *Dyce Sombre* (1849) 1 Mac & G. 116, 41 E.R. 1209.
96. *A-G* V. *Butterworth* (1963) 1 Q.B. 722, 726.
97. *S.* V. *Van Kiekerk* (1970) S.A (3) 655.
98. *Re O"Corner, Chesshire* V. *Strauss* (1896) 12 T.L.R. 291.
99. *R.* V. *Evening Standard Co. Ltd. ex p., A-G* (1954) 1 All E.R 1026.
100. *R* V. *Thomson Newspapers, ex p. A - G* (1968) 1 All E.R. 268
101 *R.* V. *Bolam, ex p. Haigh* (1949) 93 Sol. Jo - 220
102 *Superintendent of Legal Affairs Bihar* V. *Murali Manohar* (1941) 42 G.L. Jul. 225.
103. *Gaskell and Chamber Ltd. Case* (1936) 2 K.B. 595.

IN THE MATTER OF RULE under s. 105 (3) of the Constitution for Contempt of Court.

Sunil de Silva, P.C. Attorney-General with *T. Marapone,* P.C. Solicitor-General, *K.C. Kamalasabayson,* Senior State Counsel and *F.N. Gunawardene,* State Counsel in support of the Rule.

Romesh de Silva, P.C. with *Shantha Perera, Palitha Kumarasinghe, Miss Saumya Samarasekera, H. Amarasekera* and *G. Gunawardena* for respondent.

K.N. Choksy, P.C. with *L.C. Seneviratne, P.C.* and *S.C. Crosette - Tambiah* for 1st respondent in S.C. Election No. 1/89.

March 14, 1991.

FERNANDO. J.

The Respondent was charged with having unlawfully and improperly caused the publication of a news item in the "Divaina" newspaper of 12.11.90, to the effect that Mr. Dharmasiri Senanayake, M.P., had stated, in a speech made at Ambalankana, Aranayake, that the Presidential Election petition had already been proved and that if the petitioner did not succeed it would be the end of justice in this country: that these words contained an imputation that the allegations contained in the aforesaid petition have already been proved and that if the petitioner is denied success in that petition, it would amount to a total negation of justice in this country; and that the Respondent had thereby committed a contempt of this Court punishable under Article 105(3) of the Constitution. He pleaded not guilty.

The editor of the newspaper had previously pleaded guilty to a charge of contempt arising out of the same publication. In an affidavit filed in these proceedings, he stated that he did so as he accepted full and sole responsibility for that publication. Both the editor and the Respondent have explained the Respondent's position: in relation

to the newspaper and this particular publication. The Respondent is the Aranayake correspondent of the "Divaina", but is not an employee; he is paid on a piece-rate basis, and had, received an average income of Rs. 40/- per month during the preceding year: out of about 250 reports submitted by him, only 35 extracts or summaries were published - less than Rs. 2/- per report, and less than Rs. 15/- per publication. His function was only to submit accurate, factual reports of important events in his area, which he did knowing and believing that defamatory and other offending matter would be deleted by competent persons engaged for that purpose by the newspaper. It was claimed that such reports were confidential and meant only for the Editorial staff, and were not meant for publication though at the sole discretion of the Editorial staff any report may be published either *in toto* or part. In this instance, it is common ground that substantially the whole of the report was published, with the addition of a headline - "We too are ready for any election" and that the news item was attributed to the "Aranayake correspondent".

It is the Respondent's position that the report (and the news item) was a true and accurate account of Mr. Senanayake's speech; there were four supporting affidavits from persons who swore that they were present at the meeting. If the report was false, that would increase his culpability, but since the learned Attorney-General did not seek to tender any evidence, oral or documentary, to establish that this was a false report, it is unnecessary to consider whether the report was false, and for the purpose of this case it will be assumed that Mr. Senanayake did utter the offending words.

It was submitted by learned President's Counsel for the Respondent that the charge had not been established, for reasons which can be summarised as follows:

1. The Respondent's duty was only to transmit the report, and he had performed no function in regard to its publication; he had therefore not "caused the publication" of the offending passage, and it was the editor, and/or the Editorial staff, and/or other employees, who had caused the publication;

2. The Respondent had no intention either of publishing the offending passage, or of causing any prejudice to the pending Presidential Election petition;

3. Even if the words uttered by Mr. Dharmasiri Senanayake constitute a contempt, yet the news item expressly attributed those words to him; he was a politician, holding the office of Assistant Secretary of the Sri Lanka Freedom Party, whose leader was the petitioner in the Presidential Election petition; those words had been uttered in the course of a political speech made at a meeting of his political supporters, for political purposes or as political propaganda; the effect of the words in regard to the pending litigation had to be determined by reference to the ordinary or average reader of the "Divaina"; such reader would not believe or attach importance to a political speech made in those circumstances; it would therefore have no effect on the pending litigation. Further, the article in question was published on the second page, which mainly contained advertisements, and most readers, even if they did look at that page, would not have read the entire article.

Re de Souza. (1), *Re Hulugalle* (2), *Hewamanne* V. *de Silva* (3), *R* V *Evening Standard.*(4), *R* V *Griffiths* (5) and *R* V *Odhams Press Ltd* (6) were cited in support.

The offending words are clear and unambiguous. They mean that in the pending Presidential Election petition (even before the commencement of the case of the respondent) the petitioner's allegations have been established. It is the constitutional power, duty and function of the judiciary (in this case, of the Supreme Court) to decide whether a litigant has established his case. Even though it might be permissible in some circumstances for a litigant to express a view as to the merits of his case, others are certainly not entitled to give public expression to such opinions. But in this case it has also been said that if the petitioner did not obtain the relief prayed for, that would be the end of justice - the clear implication is that if the Court thought differently at the end of the case that decision would be so unreasonable or perverse as to be a travesty of justice. The statement as a whole therefore not only usurps the function of the Court, but is calculated to compel or influence the Court to reject the respondent's case even before it is heard; it seeks to exert pressure on the Court to come to a decision favourable to one party, and tends to affect witnesses who may be called to give evidence in the future. It is "calculated to obstruct or interfere with the due course of justice" (*R* V *Grey,* (7); *Perera* V *The King* (8).To intimidate

by words is no less serious than to intimidate by force. Trial must be by Judges and tribunals empowered by law to administer justice, and not by Members of Parliament, politicians, newspapers, or others; pending litigation must be free from criticism or comment that may affect its due adjudication, although much greater latitude is permitted thereafter (Borrie & Lowe, Law of Contempt, 2nd edition p. 55).

1. Did the Respondent "cause the publication" of the offending words? Particularly because sole responsibility has been accepted by the editor, learned President's Counsel argued that it was the editor and other employees who decided whether or not the news item should be published, and therefore that it was they who published and/or caused the publication of the news item; the Respondent was no more than a conveyor of information, and had no control over publication. He conceded, however, that if the editor decided to publish an article or a letter to the editor, the contributor thereof could properly be said to have "caused the publication" even though publication was entirely in the editor's discretion. It is settled law that the chain of causation extends to the author of the offending item; even employees who perform ancillary or mechanical functions unconnected with the contents of the offending item have been held liable, despite the absence of knowledge of such contents. Thus in the *St. James Evening Post* case (9), and in *Ex p. Jones,* (10), the printer of the offending publication was held liable despite ignorance of the contents. The reporter who initiated the offending item is an essential link in the chain of causation, and cannot be regarded as too remote a cause. He causes the publication no less than the contributor of an article, subject to an exception in regard to reporters who play only a subordinate and mechanical role:

> "First, there is the reporter whose sole responsibility is to gather and collect all the available information on a particular topic, but who will neither be expected to appreciate the significance of such information nor bear any responsibility for the final publication. Second is the type of reporter who being experienced, will not only be expected to appreciate the significance of the information, but whose reports will be published more or less as they stand. Third is the reporter who is not only responsible for collecting information, but who will also write the whole article himself."

"The first reporter cannot be considered to be guilty since he will lack the necessary *mens rea* - he cannot be said to intend to publish the information otherwise than to the editor and neither will he have committed the *actus reus,* since he cannot be said to have published the information nor to have caused it to be published; for he bears no responsibility for the final publication." (Borrie and Lowe, Law of Contempt, 2nd edition. p. 260).

The distinction is between the unskilled worker who merely collects the essential raw materials, and the craftsman who creates the finished product using those materials. The *Griffiths* case is an example of the first category, where the reporter took no part in the preparation of the offending article; he merely collected items of news in London and sent them to New York where it was decided what, if any, use was to be made of them; the article was written in New York. The *Evening Standard* and the *Odhams Press* cases are examples of the second and third classes. If the Respondent had been engaged in gathering information as to the views of members of the public and public figures in regard to, for instance, litigation, for the purposes of an article to be written by another, the fact that the article contained portions of the material collected by the Respondent would probably have put him into the first category. Here the news item, apart from the headline is substantially the same as the report submitted by him, and he is responsible for the finished product; that responsibility is not diminished by reason of a few finishing touches put by the editorial blue pencil. During the preceding year, he was not paid for submitting 250 reports, but only for what was published. He therefore caused the publication of the offending report.

2. Then it is said that the Respondent lacked the intention to publish the offending words and to cause any obstruction or prejudice to pending litigation. The first limb of this submission is not borne out by the facts, and the second is clearly untenable in law. The Respondent submitted reports not merely in the hope but with the object of publication, in whole or in part; may be, it was only a pittance that he received for his labours, but publication was his aim. The fact that he did not know this report would be published, or that he considered the probability of publication to be low does not detract from his intention and

desire that it be published. It was urged that the report was confidential and intended only for the editorial staff, but this is contradicted by the fact that payment was not for what was submitted, but only for what was published. Intention to publish is a necessary ingredient: thus a Barrister who lent a copy of a newspaper, without knowledge of its offending contents, was held not guilty of contempt because he never intended to publish *(McLeod* v *St Aubyn.* (1899) A.C. 549). The Respondent did intend to publish the report. The fact that he had no intention whatever "of causing disrepute or disrespect to the Supreme Court or any Court and/or of causing any obstruction to the Election Petition case" is irrelevant, because all that is required is that the publication, viewed objectively, is "calculated" to obstruct or interfere with the due course of justice", and this has been laid down in a stream of previous decisions *(Wahab* v *Perera* [12]; *A.G.* v *Laxapathy* [13] ;*Jayasinghe* v *Wijesinghe* [14] ; *Re Ratnayake* [15] ; *Veeraswamy* v *Stewart* [16] ; *A.B.* v *Vaikunthavasan* [17] ; *R* v *Peries* [18].)

To establish a charge of contempt it is not necessary to prove that the Respondent intended a particular meaning or effect; intention is not an ingredient, though often an aggravating circumstance, relevant to punishment.

3. Finally, learned President's Counsel submitted that despite the objectionable nature of the words themselves, their effect on the average reader of the "Divaina" had to be ascertained according to the principles laid down in the three local decisions cited by him; since the statement had been expressly attributed to Mr. Senanayake, such reader would attach no value to it, in the circumstances referred to earlier; and therefore the statement would have no effect whatsoever on the pending litigation; if, however, the statement had been made by a retired Judge of this Court or by a Professor of Law, the position would have been entirely different. When reminded that Mr. Senanayake was described as the Assistant Secretary of the Sri Lanka Freedom Party, Counsel replied that high office did not result in greater credibility so far as politicians were concerned. This led him into all sorts of difficulties; if the statement had been made by the petitioner herself, or if the converse had been stated by the respondent, would it have had no effect on the reader ? If it had been made by a practising lawyer, or a politician-cum-lawyer, or

a retired Judge now engaged in politics, how would its effect on the reader be assessed? Naturally, no clear answer was forthcoming. There is neither precedent nor justification for assessing an impugned statement in this way. Undoubtedly the personality or position of the speaker, and the occasion on which he speaks, may be of some relevance; considerable licence may perhaps be extended to those in the position of a Court Jester of old, or of tender years, or mentally deficient persons, since theoeffect of their statements on the public would be minimal. Apart from such exceptional cases, I do not think that any category of adults of sound mind can be granted such an extensive privilege of making, with impunity, statements prejudicial to pending litigation. Nor am I prepared to take judicial notice of a sweeping proposition that the public of Sri Lanka, or the readers of the "Divaina", consider politicians or any other category of persons to be either intrinsically untruthful or unreliable, or worthy of credit. Apart from Parliamentary privilege, politicians have no greater freedom of speech, and are subject to no less stringent restrictions thereon in regard to contempt of Court, than other citizens. The decisions of this Court, in this branch of the law of Contempt, have never granted or recognised any such privilege or immunity of politicians. *Jayasinghe* v *Wijesinghe* dealt with a notice of a meeting to be held under the presidentship of a Member of the State Council. In *Re Ratnayake* an Advocate-cum-State Councillor was found guilty but discharged with a warning where he had (in his capacity as an ordinary citizen) written to a Judge informing him that a party to a pending case, against whom a warrant had been issued for failure to appear on summons, was in a delicate state of health, and requesting a postponement:

> "the contempt is not a serious one, but it amounts to an attempt to influence the Judge upon a matter publicly before him, and it is very necessary, in my opinion, that (it) should be the subject of judicial action, and it is of greater importance in this particular case where the respondent is not only an Advocate but is a Member of the State Council. Persons in the position of the respondent must be made to realise that they cannot interfere in the course of justice, and that if they do so interfere, or attempt to interfere, they will be punished."

The rationale for this view appears from *Wahab* v *Perera* [12] :

> "This, we understand, is the first case of its kind that has occurred in the Island. We hope that it will be a very long time before there is another. The people of this country have travelled far along the road which leads to the management of their own affairs . . . and must realise that these people who have the privilege of making the laws which govern them have also the stern obligation of obeying those laws."

A politician was also found guilty of contempt of court in *Re Wickremasinghe* [19], and this Court had no doubt that at least some listeners might be convinced by him:

> "the object of this branch of the law, of course, is not the protection of the personal reputation of judges but the protection of the authority of the courts, which must be preserved in the interests of the community. It is therefore no less an offence to scandalise the judiciary generally than to scandalise the judge or judges of a particular court. No person who may have been persuaded by the respondent's speech to accept the views he expressed about the judiciary could continue to have confidence in the impartiality of the courts of justice."

In *Hewamanne* v *de Silva,* [3] the decision turned principally on the question whether the publication of a notice of motion contained in an Order Paper of Parliament was protected by the cloak of Parliamentary privilege, and the majority thought it was not; however, the resolution, the contents of which were held to constitute a contempt of this Court, was to have been moved by the Minister of Justice, but the Court did not consider that this opinion of a politician would have such little effect on the public that it would not constitute a contempt.

Freedom of speech and expression is important, but is not absolute. The public interest requires that the Judiciary must discharge its functions, free of bias, partiality, force, or other public or private influence, thereby ensuring that every dispute will be resolved by a fair trial according to law. This branch of the law of contempt seeks to balance the citizen's freedom of speech and the public interest in

the resolution of disputes by independent judicial adjudication. In that context there is no place for trial by politicians, the media, hoodlums, or others, and the law of contempt thus prohibits comments and criticisms which will affect the fairness of a trial or usurp the power of the Judiciary; the Constitution and the law do not allow politicians any greater immunity or licence than the ordinary citizen (except as provided by the law relating to Parliamentary privilege).

The argument that the news item was published on the second page and would, despite its prominent headline, have escaped the attention of the average reader must be mentioned only to be rejected; that is at most only a mitigating circumstance. In the result, the Respondent's third contention fails.

For these reasons, at the conclusion of the proceedings, the Respondent was found guilty of contempt of this Court, and the Rule was made absolute. Considering the serious nature of the offence, and that the law on this point has long been settled and is free of doubt, it is a matter for regret that the Respondent did not, even at the close of the argument, acknowledge his offence and tender an apology, However, as the editor had already accepted full responsibility, and considering the Respondent's indigent circumstances, we refrain from imposing any punishment.

DHEERARATNE J: I agree

AMERASINGHE J:

I have had the advantage of reading the judgment of my brother Fernando, J. in draft form and I agree that the rule must be made absolute but that no punishment shall be imposed.

A Bench of the Supreme Court, in the exercise of its jurisdiction under Article 130 of the Constitution, is currently engaged in hearing a legal proceeding relating to the election of the President of Sri Lanka. During that hearing, on 12 November 1990, the *Divaina* newspaper reported, under the headline "We too are ready for election", that Mr. Dharmasiri Senanayake, a member of Parliament, had made a speech at Anbalankana, Aranayake, in which he had stated that the case of the petitioner had already been proved, and that if the petitioner did not succeed, it would be the end of justice in the country.

The respondent who reported that speech is charged in this case, in the exercise of the jurisdiction conferred on the Supreme Court by Article 105 (3) of the Constitution to punish for contempt of itself.

Contempt of Court as Joseph Moskovitz (Contempt of Injunctions, Civil and Criminal, 1943 43 Col. L.R.780) observes, is the Proteus of the legal world assuming an almost infinite diversity of forms. Contempt of Court, which has been irreverently termed a legal thumbscrew, is so manifold and so amorphous that it is difficult to lay down any precise definition of the offence (See Oswald, *Contempt of Court,* 1910 3rd Ed. by G.S. Robertson at P. 5; Cf. Glanville Williams, *Textbook of Criminal Law,* 1983, 2nd Ed. p. 16, *Miller* v *Knox* [20] per Williams, J.)

Because the offence of contempt is amorphous and has no determinate shape or structure and is virtually unrestrained in the will of the Court, the jurisdiction to punish for contempt given by Article 105 (3) of the Constitution ought to be jealously and carefully watched and cautiously exercised with the greatest reluctance and the greatest anxiety (Cf. per Jessel, M.R. in Re *Clements, Republic of Costa Rica* v *Erlanger* [21]; In Re *Maria Annie Davies* [22]; per Sterling, J. in *Greenwood* v *The Leather-shod Wheel Co. Ltd.* [23]

What is the offence of Contempt of Court? In *Miller* v *Knox* (supra) at p. 588, it is said to be disobedience to the Court, an opposing or a despising the authority, justice, or dignity thereof. It commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the Court."

In the *St. James Evening Post* case [9] Lord Hardwicke, L.C. said that "There are three different sorts of contempt. One kind of contempt is scandalizing the Court itself. There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this Court, in prejudicing mankind against persons before the cause is heard."

Lord Radcliffe in delivering the decision of the Privy Council in *Reginald Perera* v *The King* [8] said that for such an act of contempt as in the case before us to be committed "There must be involved some act done or writing published calculated to bring a Court or

Judge of the Court into contempt or to lower his authority or something calculated to obstruct or to interfere with the due course of justice or the lawful process of the Court."

Oswald *(Contempt of Court,* 1910 3rd Ed. by G.S. Robertson) at p.10 said that "To speak generally, Contempt of Court may be said to be constituted by any kind of conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudic parties litigant or their witnesses during the litigation." This definition was adopted in 1959 by the report of the committee of *Justice* on the subject of Contempt of Court under the Chairmanship of Lord Shawcross at p.4 as being one the committee could not improve on.

Article 105 (3) of the Constitution gives the Supreme Court all the powers of a superior court of record including the power to punish for contempt of itself whether committed in the Court itself or elsewhere. The complaint here is not that there was a direct act of contempt committed *ex facie curiae* but that there was an indirect, constructive contempt committed outside the Court by the publication of a statement about a matter that is pending before the Supreme Court.

The statement in question is said to be an act of contempt because it involves an interference or likely interference with the due administration of justice, both in the particular case of the election petition and, more generally, as a continuing process, and thereby constitutes a challenge to the fundamental supremacy of the law. It is in the public interest that Article 105, through the power it confers on the Court to punish for contempt, ensures the fairness of particular trials and the continuing authority of the Court. In *R* v *Almon* (24) it was said that the power of punishing for contempt has been given to the Courts "to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public." This does not mean that it is a power given, as Woodrenton, C.J. explained in *Kandaluwe Sumangala* v *Mapitigama Dharmadutta et al.* (25) for the "glorification of the Bench" but rather" solely for the benefit of the public". This, Woodrenton, C.J. said, is a fact of "vital importance". although "extremely difficult to bring home to the minds of some people." (Cf. *Re Wickramasinghe,* (19) at per Gunasekera, *J.R* v *Davison* (16). *In re Johnson* (27) per Bowen, *L.J. Johnson* v *Grant,* (28); *A-G* v *Times Newspapers* (29); *A - G* v *Leveller Magazine Ltd* (30).

In *Ex parte Fernandez* [31]) Willes, J. expressed the principles on which the jurisdiction is to be exercised in the following admirable, terms: "We have been urged to be careful of being misled by our own way of thinking, in the decision of this case, because, as it was suggested, our privileges are involved in the question. As that course has been adopted. I take leave to say that I am not conscious of the vulgar desire to elevate myself, or the Court of which I may be a member, by grasping after a pre-eminence which does not belong to me; and that I will endeavour to be even valiant in preserving and handing down those powers to do justice and to maintain truth, which, for the common good, the law has intrusted to the Judges."

In the same case, but as reported in 30 L.J.C.P. 321 at p. 332, Erle, C.J. said: "There are many ways of obstructing the Court. Endeavours are not wanting either to disturb the Judge or to influence the jury, or to keep back or pervert the testimony of witnesses, or by other methods according to the emergency of the occasion to obstruct the course of justice. These powers are given to the Judges to keep the course of justice free; powers of great importance to society, for by the exercise of them law and order prevail; those who are interested in wrong are shown that the law is irresistible. It is this obstruction which is called in law contempt, and it has nothing to do with the personal feelings of the Judge, and no Judge would allow his personal feelings to have any weight in the matter. According to my experience, the personel feelings of the Judges have never had the slightest influence in the exercise of those powers entrusted to them for the purpose of supporting the dignity of their important office; and so far as my observation goes, they have been exercised for the good of the people."

Lord Cross of Chelsea in *A. - G* v *Times Newspapers* [29] said; "Contempt of court means an interference with the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court. Nowadays when sympathy is readily accorded to anyone who defies constituted authority the very name of the offence predisposes many people in favour of the alleged offender. Yet the due administration of justice is something which all citizens, whether on the left or the right or in the centre, should be anxious to safeguard."

It is because the protection of the due administration of justice and

not the advancement of the interests of the Judges is the concern of the law of contempt that an apology to the Judges is irrelevant and of no avail in deciding whether the *actus reus* of the offence has been established. In *The Attorney-General* v *Vaikunthavasan* [17] Basnayake, J. said: "There appears to be an impression that an apology to the Court erases the effect of a contempt of this nature. In order to remove that impression I wish to repeat here the words of Darling, J. in *Rex* v *Clarke* [32]: "It is not to the Court that an apology can do any good. Apology is due to the person whose trial might have been prejudiced, and the public whose interest it is to see that justice is fairly administered in this case, and not to the Court which has no feeling in the matter." When the Court imposes a punishment for contempt, it does so, as Abrahams, C.J. said in the matter of the rule on *Hulugalle* [2], "in the interests of the public."

An explanation that there was no ulterior intention to interfere with the course of the administration of justice, and an unreserved withdrawal of the insinuations and an expression of regret, even though belatedly made (see *In the matter of the rule on De Souza* [1]), however, will be relevant, after determining culpability, in deciding the question of punishment. Moreover, the absence of a customary apology to the Judge may, as in re *Jayatilake* [33] per Tambiah, J. be regretted as showing a lack of courtesy. (See also per Keuneman, S.P.J. in re *Ragupathy* [34]; per Gunasekera, J. in re *Wickramasinghe* [19] where the expressions of regret were not regarded as "sufficient" for the offence committed in those cases). Its absence would certainly be noticed. (E.g. see in the matter of *Hulugalle* [2]). But that is another matter.

In this connection it might be observed that the jurisdiction of the Court should be exercised with care, for, as Oswald, (*op cit. pp.* 17 - 18) observes, "the defendant is usually reduced, or pretends to be reduced, to such a state of humility, in fear of more severe consequences if he shows any recalcitrancy, that he is either unable or unwilling to defend himself as he might have otherwise done."

What do the words complained of mean? In ascertaining the meaning of statements published in newspapers, as in the case before us, I would, with respect, follow the guidelines proposed by Woodrenton, C.J. in the case or *Armand de Souza* [1]. They were guidelines followed by Abrahams, C.J. in the matter of the rule on *H.A.J. Hulugalle* [2] and by Keuneman, S.P. J. in the matter of a rule on

Ragupathy [34] Woodrenton, C.J. said: "The Court has itself to interpret the meaning of the language used, and in doing so consider how it will be understood by the majority of those whom it reached. It was published in a daily newspaper. It is clear that the readers of such an article as this would not stop to subject it to the minute analysis which it received at the Bar, or to consider how far the character of the warp of one line of criticism was modified by woof of a different texture. They would read the article as such articles are read every day by ordinary people who have no time, even when they have the capacity, to carry out such a process of balancing, and who would be guided in the long run by the general impression which the article left in their minds." If, with respect, I might amplify what Woodrenton, C.J. was saying, I would suggest that what imputation, including any implication or inference, is conveyed by any particular words is to be determined by an objective test, that is, by the meaning in which reasonable readers of ordinary intelligence, with an ordinary man's general knowledge and experience of worldly affairs, would understand them, unfettered by any strict legal rules of construction. The imputation convered is not necessarily determined by the meaning which the majority of the readers of the *Divaina* understood them. Nor is the imputation to be determined by what Mr. Senanayake, the reporter or the editor intended.

Applying that test to the language before us, it seems to me that the article in question means that the Judges in the proceeding before the Court had already made up their minds. At the relevant time the respondent had not yet led his evidence. What would the majority of people who read that article have thought? I think they would have thought it of little or no use to say anything more in the case. Some of them who were potential witnesses might have considered it futile to testify and might, therefore, have been deterred from coming forward to give evidence. This would prevent the respondent in the matter pending before the Court from pursuing a full presentation of his case. Deprived of all the relevant evidence it might have otherwise considered, the Court would be impeded in conducting a fair proceeding. The statement, therefore, interferes with the administration of justice. Any act which interferes or attempts to interfere with witnesses, whether it be by threat, persuasion or otherwise, inteferes with the course of justice and is a contempt of court. (Cf. *R* v *Lady Lawley* [35]; *R* v *Hall* [36]; *R* v *Steventon* [37]; *R* v *Loughran* [38]; *R* v *Talley* [39] ; *Lewis* v *James* [40]; *In re*

to *Johnson* [27]. *R* v *Gray* [41] ; Oswald, op. cit. 7, 52 and 89;) Both in *Spurrell* v *De Rechbery* [42] and in *Greenwood* v *The Leather-shod Wheel Co. Ltd.* (23) statements which were held to have been likely to have deterred witnesses from giving evidence were therefore regarded as acts of contempt. As Lord Langdale M.R. said in *Littler* v *Thomson* (43): "if witnesses are . . . deterred from coming forward in the aid of legal proceedings it will be impossible that justice can be administered. It would be better that the doors of the courts of justice were at once closed."

On the other hand, in the hope that their evidence may retrieve the position, other witnesses may, in their, albeit mistaken, enthusiasm tend to exaggerate their evidence, with equally unsatisfactory results for the particular case and for the administration of justice in general. In *Abdul Wahab* v *A.J. Perera et al.* (12), pending a criminal charge against a person, the respondents in a leaflet had suggested that the accused was guilty of the offence with which he was charged. Abrahams, C.J., after reflecting upon the likely effect of the statement upon jurors, said that "in a more suitable way possible witnesses for the prosecution and the defence may be in the one case influenced to exaggerate their evidence and in the other actually deterred giving it."

With regard to the possibility of exaggeration, however, one may, perhaps, derive some comfort from the assuring words of Shaw, L.J. in *Schering Chemicals Ltd.* v *Falkman Ltd . and others* (44). His Lordship said: "Witnesses in an action are credible and reliable or they are not. Our system of trial in which evidence is elicited by examination and cross-examination provides them means of demonstrating the character and quality of a witness." In the circumstances of that case, the suggestion that prospective or potential witnesses may be deterred or discouraged from contributing their testimony was regarded by Shaw, L.J. at p. 339 as being "insubstantial".

In the case before me, however, I am satisfied that the statement that the petitioner's case had been already established would tend to hold back witnesses who were prepared to say from their actual knowledge what was at variance with or in contradiction of the petitioner's case. There was, therefore, an interference with the administration of justice and, consequently, an act of contempt.

The result of the matter proceeding before the Court, it was alleged in the statement in question, was evident even before the respondent had submitted his case. If, in such circumstances, the Judges had already made up their minds, they could have done so only if they had been biased. What other meaning could be reasonably given to the words by the majority of readers? Would such statement not diminish the confidence of the public in the Judges in the case before the Court as well as in the administration of justice as a continuing process? For what should the public think of and come to expect of biased judges who make up their minds before hearing both sides? In *The Road to Justice* (1955 p. 73 Sir Alfred Denning (as he then was) said: "The judges must of course be impartial. If they should be libeled by traducers, so that people lost faith in them, the whole administration of justice would suffer."

There has never been any doubt that imputing unfairnes, bias or lack of impartiality to a Judge in the discharge of his judicial duties lowers his authority and interferes with the performance of his judicial duties and therefore constitutes an act of contempt. (E.g. see in re *Wickramasinghe* [19] per Gunasekera, J. : In the matter of *Armand de Souza* [1] ; *Vidyasagara* v *The Queen* (45) *Hewamanne* v *de Silva* (3) per Wanasundera, J. at pp. 78 - 107 and per Ranasinghe, J. at pp. 134 et seq *New Statemsman* case [46]. Such statement would, as Wilmot. J. observed in *Almon's Case,* excite in the minds of the people "a general dissatisfaction with all future determinations and indispose their minds to obey" the Judges. Such statements would, as Wilmot, J. said, "taint the fountain of justice so that judgments which stream out of that fountain would be regarded as impure."

The statement in question also asserts that if the petitioner is unsuccessful, there would be an end of justice. The relevant sort of readers, I think, would regard this is as a kind of ultimatum. If the petitioner's prayer is not answered, it would be on pain of unpleasant, ill-boding, and perhaps even fearful and dire, consequences. There is an undoubted attempt to coerce the Judges.

Judges, though in no sense superhuman are by training supposed to have no difficulty in putting out of mind matters which are not in evidence in a case. (Cf. per Lord Parker, C.J. in *R.* v *Duffy, ex p. Nash* [47]. In *Attorney-General* v *B.B.C.* [48] Lord Salmon at p. 342 said: "I am and have always been satisified that no judge would be

influenced in his judgement by what may be said by the media. If he were, he would not be fit to be a judge. "And Lord Reid in *Attorney-General* v *Times Newspapers* [29] that "it is scarcely possible to imagine a case when comment could influence judges in the Court of Appeal or noble and learned Lords in this House. In *Vine Products* v *Green* [48] Buckley, J. held that the article in question did not raise a serious risk of prejudice and that there was no contempt in that case. In *Schering Chemicals* v *Falkman Ltd* [44] Shaw, L.J. at p. 339 said: "I cannot see that the fair trial of the issues in the pending actions would be in any way hampered or adversely affected if the programme were shown. The trial is to be by a judge alone; it is safe to assume he will not be improperly influenced in any way should he see the programme or read the manuscript."

However, in *Attorney-General* v *Times Newspapers* (supra) a majority of their Lordships concurred in the view that the article was a prejudgment of the case, and so, technically a contempt, although not one worthy of punishment. And Humphreys, J. in *Davies ex p. Delbert-Evans* (50) expressed the view that it was wrong to publish matter which might embarrass a judge and make it more difficult for him to do his work. Moreover the view that Judges are not ever likely to be influenced by the comments of other persons and that, therefore, there is no risk of prejudice, is by no means, free from doubt. Thus in *Attorney-General* v *B.B.C.* [57] Viscount Dilhorne at p. 335 said: "It is sometimes asserted that no judge will be influenced in his judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a judicial office does his utmost not to let his mind be affected by what he has seen or heard or read outside the court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of judicial duties. Nevertheless it should, I think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it."

Woodrenton, J. in *Kandoluwe Sumangala* v *Mapitigama Dharmarakitta et al* (25) said "It is of the highest importance that while causes are

testimony of witneses, or which could create any adverse and unjust impression upon the Court. I need scarely point out that the latter consideration applies whether the cases are to be tried by juries or by Judges. For every one who has exercised judicial office knows that it is extremely difficult to keep the mind clear from misconception and free from prejudice, if by some mischance the Judge has heard private or public gossip in regard to, or irresponsible comment upon, the case he has to decide."

I am of the view that the statement in the report attempting to coerce the judges tended to interfere with the due course of justice and was therefore an act of contempt. What is relevant is not the fact that the judges *will* be actually or probably prejudiced, but that the nature of the statement was such that prejudice *might* result. In *Hunt* v *Clarke* [52] (followed by Roch, J. in *Jayasinghe* v *Wijesinghe* [4], Cotton, L.J. said: "It is not necessary that a Judge or jury will be prejudiced, but if it is calculated to prejudice the proper trial of cause that is a contempt and would be met with the necessary punishment in order to restrain such conduct" (Cf. also per Soertsz. J. in *Veerasamy* v *Stewart* [16] ; In *re Pall Mall Gazette, Jones* v *Flower* [53]; *Grimwade* v *Cheque Bank Ltd.* [54].

In sum, the statement in the *Divaina* of 12 November, 1990, has a tendency to produce an atmosphere of prejudice in the midst of which the proceeding in the matter of the election petition must, regrettably, go on, and in that way, it tends to interfere with a fair trial of the case. (Cf. per Lord Alverstone, C.J. in *R* v *Tibbits* [55] followed by Soertsz, J. in *Veerasamy* v *Stewart* [16].) The statement also tends to interfere with the administration of justice as a continuing process.

It was suggested by learned President's Counsel for the respondent that sometimes certain persons, particularly litigants, prematurely claim victory for one party. To do so in this case would be to usurp the functions of the Court for it is the Supreme Court alone which is, in terms of Article 130 of the Constitution, entitled to determine and make orders on a proceeding relating to the election of the President. Trial by newspaper or trial by any other medium than the courts of law cannot be permitted. (See *Birmingham Vinegar Brewery* v *Henry* [56]; *R* v *Parke* [57]. In *re Finance Union* [58]. Thus prejudgment in a proclamation *(Kandoluwe Sumangala* v *Mapitigama et al.* [25] or notice *(Jayasinghe* v *Wijesinghe* [14]; *Abdul Wahab* v *A.J. Perera*

et al [12] or a notice followed by a public meeting *(A- G* v *M. de mel Laxapathy* [13] would be actionable as a contempt of court. In *Kandoluwe Sumanagala* v *Mapitigama Dharmarakitta et al* (supra) Woodrenton. J. at p. 201 said: "It is of the highest importance that while cases are still undecided, nothing should be said which could influence the testimony of witnesses or which could create any adverse and any unjust impression upon the mind of the Court."

This principle applies to election petitions as well as to other cases. Thus in *re Tyrone Election Petition,* [59] (cf also *In re Montgomery Election Petition* [60] and *In re Pontefract Election Petition),* [62] during the pendency of an election petition, the proprietor of a newspaper published in his journal a series of articles calculated to interfere with the course of justice and to prevent witnesses affording him their evidence. It was held that the publication was a contempt of the Irish Court of Common Pleas.

Whether in a given case the discussion or comments upon a pending case are unseemly or harmful to the administration of justice, will depend upon the circumstances. Each case, as Templeman, L.J. observed in *Schering Chemicals* v *Falkman Ltd* [44] at p. 348 must be judged on its own merits.

One thing, however, applies to all cases. It is not permissible for anyone to pre-judge issues in pending causes and thereby venture to supplant the authority of courts of law which have been established for the pacific settlement of disputes and the maintenance of law and order in Sri Lanka. Why?

It is in the interests of litigants that this should be the case. As Lord Morris observed in *A - G* v *Times Newspapers* [29] : "The courts, I think, owe it to the parties to protect them either from prejudices of pre-judgment or from the necessity of having themselves to participate in the flurries of pre-trial publicity" Trials by newspapers or any other medium lack the safeguards that are expected by the parties to be found in legal proceedings such as those provided by rules of procedure, including the right to reply or cross-examine, and the rules of evidence, including the exclusion of hearsay evidence. Trials by newspapers and other media, deprive the parties of having their causes determined impartially and with reference solely to the facts judicially brought before a tribunal. The tendency of a media trial is, as Wills, J. put it in *R* v *Parke* [57], is "to reduce the court

which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned."

Looking beyond the particular case, one has to consider the long term effects of the statement on the administration of justice. To permit others to arrogate to themselves the right to adjudicate upon matters that are before a court of law would be to place the very structure of ordered life, which depends on the pacific settlement of disputes by courts of law, in jeopardy. (Cf. per Lord Morris in *Attorney-General* v *Times Newspapers* [29]). As Lord Diplock observed in the *Times* case at pp. 309 - 310 "trial by newspaper, i.e. public discussion or comment on the merits of a dispute which has been submitted to a court of law or on the alleged facts of the dispute before they have been found by the court upon the evidence adduced before it, is calculated to prejudice the requirement that parties to litigation should be able to rely upon there being no usurpation by any other person of the function of that court to decide that dispute according to law. If to have recourse to civil litigation were to expose a litigant . . . to public and prejudicial discussion of the facts or merits of the case before they have been determined by the court, potential suitors would be inhibited from availing themselves of courts of law for the purpose for which they are established."

In the *Times Newspapers* case (supra) Lord Simon at pp. 315 - 316 explained that the law of contempt "is the means by which the law vindicates the public interest in due administration of justice - that is, in the resolution of disputes, not by force or by private or public influence, but by independent adjudication in courts of law according to an objective code. The alternative is anarchy including that feudalistic anarchy which results from arrogation to determine disputes by others than those charged by society to do so in impartial arbitrament according to an objective code."

The rule against prejudgment operates even though there may be no risk of prejudice in the particular case because it is likely to produce escalating, unfavourable reactions in others. As observed by the European Courts of Human Rights in the *Times Case,* the regular spectacle of pseudo-trials in the news media is likely in the long term to have nefarious consequences for the acceptance of the Courts as the proper forum for the settlement of legal disputes. The reason was explained by Lord Cross of Chelsea in the *Times*

Newspapers Case [29] (1974) A.C. 273 at pp. 322 - 323 in the following terms: "But why, it may be said, should such a publication be prohibited when there is no such risk? The reason is that one cannot deal with one particular publication in isolation. A publication prejudging an issue in pending litigation which is itself innocuous enough may provoke replies which are far from innocuous but which as they are replies, it would seem unfair to restrain. So gradually the public would become habituated to, look forward to and resent the absence of, preliminary discussions in the media of any case which aroused widespread interest. An absolute rule - though it may seem to be unreasonable if one looks only to the particular case - is necessary in order to prevent a gradual slide towards trial by newspaper or television."

I do not mean that acts done in courts of law cannot ever be the subject of report, comment or criticism. The law imposes no blanket of silence on the news media. There is no total embargo on reporting court proceedings during the currency of a trial. Fair and accurate reports of proceedings in open court are permitted regardless of the risk of prejudice. Nor is there an unqualified prohibition on comment and criticism once legal proceedings are over. For, as Lord Atkin observed in *Ambard* v *Attorney-General for Trinidad and Tobago* (62), (followed by Abrahams, C.J. *In the matter of a rule on H.A.J. Hulugalle* [2] at p. 398). See also per Gunasekera, J. in re *Wickramasinghe* (19): "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men."

In Metropolitan Police Commissioner, ex P. Balckburn (63) Lord Denning, M.R. said that "It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say we are mistaken, and our decisions erroneous, whether they are subject to appeal or not."

Our Courts have consistently taken the view that they are far from averse to criticism. In the matter of a rule issued on *F.A. Capper and H.A. Capper,* the proprietor and publisher of the *Times of Ceylon,* (64) , Bonser, C.J. (Lawrie and Withers, JJ. agreeing) at p.319 said: "Now, we all as Englishmen are proud of the freedom

of the press. Free criticism is a condition of the health of the body politic; but free criticism must not be carried to undue lengths. Liberty must not be allowed to degenerate into licence. The due administration of justice is the foundation stone of all our liberty; and unless justice is purely administered without fear or favour, existence is not worth having."

Our own Sri Lankan Judges have shared the views of their English brothers on the Bench. For example, in the matter of *Armand de Souza,* [1] Pereira, J. and De Sampayo, A.J. agreed with Woodrenton, C.J. at p.41 when the Chief Justice said: There is, as I have said, no kind of doubt as to the right by any member of the public to criticize, and to criticize strongly, judicial decisions or judicial work, and to bring to the notice of the proper authorities any charge whatever of alleged misconduct on the part of a Judge."

Pereira, J. In the matter of the rule on re *De Souza* [1] said: "I would gladly welcome fair criticism to the fullest extent on my orders and judgment as a Judge of this Court. Reasonable argument and expostulation however is one thing; the publication of false or fabricated material in order to hold the Court or Judge up to odium or ridicule is another."

Indeed, Soertsz, J. in *Veerasamy* v *Stewart* [16] regarded the Press as the Court's partner in the search for justice. At p.486 he said: "No one desires to fetter unduly the freedom of the Press, least of all Courts of Law, for the Press can be, and has often been a powerful ally in the administration of justice." His Lordship, however, emphasized that "it is essential that judicial tribunals should be able to do their work free from bias or partiality and the right of accused persons to a fair trial should be absolutely unimpaired."

In *Reginald Perera* v *The King* [8], the Privy Council gave as its final reason for advising that the appeal be allowed that what was published was honest criticism on a matter of public importance.

In re Wickramasinghe [19], Gunasekera, J. quoted the following passage from the decision in *Ambard* v *Attorney-General for Trinidad and Tobago* [62] "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 criticism, and not acting in malice or attempting to impair the administration of justice, they are immune." Gunasekera, J. then added: "While there is no question that judges and courts are open to criticism, there is no longer any room for doubt that scandalizing a judge is punishable as a contempt."

That passage was also quoted with approval by Abrahams, C.J. in *Hulugalle's Case* (supra) at p. 308. Abrahams, C.J. said: "It would be thoroughly undesirable that the press should be inhibited from criticizing honestly and in good faith the administration of justice as freely as any other institution. But it is equally undesirable that such criticism should be unbounded."

All the judges in *Hewamanne v De Silva and Another* [3] stressed the important role of the press in Sri Lanka. (See especially the remarks of Ranasinghe, J. at pp. 173-175).

What is prohibited are comments that are factually incorrect or unfair or unconcerned with matters of genuine public concern or which tend to bring the authority and administration of law into disrespect or disregard and comments that interfere with or prejudice the fair trial of a pending cause. The law of contempt does not prevent the publication of honest and genuine criticism and comment, expressed in appropriate terms. (*Gray's case* [7] *Police Commissioner, ex p. Blackburn* per Salmon, J. *Hewamanne v* De Silva [3] at p.34 per Wanasundera, J. and at p. 156 - 161 per Ranasinghe, J, (Cf. *In re Capper* (64) per Bonser, C.J.). Comments about pending cases are not necessarily unseemly or harmful to the administration of justice and therefore they are not absolutely prohibited. (Cf. *Schering Chemicals* v *Falkman Ltd* [44]). But comments should be postponed if they may prejudice a fair trial. Cf. per Lord Reid in *A - G* v *Times Newspapers Ltd.* It may, as Soertsz, J. observed in *Veerasamy* v *Stewart* [16] be "poor comfort" to be told that although one may not express one self while a case is pending which may cause prejudice, yet vent may be given to one's feelings "when the case has been finally decided so long as one confines oneself to relevant facts and keeps within bounds." But, as Soertsz, J. added, "that appears to be well settled law."

Does this not come into conflict with the important fundamental right of free speech and expression? In terms of Article 14 of the Constitution, every citizen is entitled to the freedom of speech and

expression Including publication. Yet where the exercise of this right would be calculated to create a risk of prejudice, either to a particular trial or to the administration of justice generally, that freedom must, in the interests of society, be curtailed. The law of contempt of court operates "untrammeled by the fundamental right of freedom of speech and expression contained in Article 14" of the Constitution. (Per Wanasundera, J. in *Hewamanne* v *De Silva* (3))

I am of the view that the article in question was way beyond the permitted limits of comment since it tended to obstruct or impede the proceeding before the Court and because it tended to bring the administration of justice into disrepute.

It was submitted by learned President's Counsel for the respondent that the article was published on the second page of the *Divaina* newspaper, which was largely devoted to advertisements, and that therefore there was little likelihood of prejudice with regard to the proceeding before the Court. It was also suggested that the whole of the article may not have been read, although the basis upon which that supposition rested was not explained to us. Published as it was under a bold headline, it was more than likely that the article attracted the attention of a large number of readers. Perhaps the article may have caused somewhat less harm than if it had appeared on the front page of the newspaper. This may be a mitigating circumstance. But even on the second page, it did present a real risk of prejudice. Considering that the circulation of the *Divina* newspaper is nation-wide, there was a strong probability that it would be read by at least some of the judges and potential witnesses in the case which was commented upon as well as by many other members of the public who were unconnected with the proceeding before the Supreme Court but who might be litigants or witnesses in other cases. The administration of justice in the particular matter before the Supreme Court and in other cases as a continuing process was likely to be obstructed, impeded or prejudiced.

It was submitted on behalf of the respondent that the speech in question was made by a politician at a political meeting and that readers would, therefore, regard it no more than a piece of worthless political propaganda. In the circumstances, it was submitted, the publication was not actionable.

In *Veerasamy* v *Stewart* [16] Soertsz, J. said that he should "bear in mind that the summary jurisdiction to punish for Contempt of Court must not be exercised in regard to matters which can, if at all, be said to tend to prejudice or interfere with parties or the course of justice only in some remote or far-fetched manner. It has been observed that Courts should not be astute to exercise this summary pwer to punish contempts of a *technical* kind."

In *Jayasinghe* v *Wijesinghe* [16] Koch J said: "I think that if the publication, taken in connection with the circumstances of the case, is such that it tends or is calculated to prejuedice the petitioner in obtaining a fair and impartial trial, the Court ought to interfere and punish the offender whether there was any intention to so prejudice the petitioner or not; but if, in the circumstances, the offence is of such slight and trivial a character as to amount to a commission of a technical contempt only, and if the petitioner is not likely to be prejudiced in his trial, the Court will not interfere."

Koch, J. and Soertsz, J. ought not to be taken, as some English cases seem to have done, (e.g. cf *Chambers* v *Hudson Dodsworth & Co.* [65]; *Carl-Zeiss Stiftung* v *Ryner & Keeler Ltd* [66]. *Vine Products* v *Green* (49)) to import the concept of seriousness into the question of whether there is a contempt at all . Koch and Soertsz, JJ. were, I believe, in no doubt that the offence had been committed, although the absence of serious prejudice was a matter which they took into account in deciding what course of action might be taken against the offender. A "technical contempt", as the Court said in the Australian case of *A.G. (N.S.W.)* v *John Fairfax & Sons Ltd.* [67] "is contempt". The separate, subsequent question of what action the Court would take, in terms of punishment having regard to the degree of prejudice occasioned by the statement is another matter. (Cf. per Koch, J. in *Jayasinghe* v *Wijesinghe* [14] per Poyser, S.P.J. In re *Ratnayake* [15]; per Basnayake, J. in *Attorney-General* v *Vaikunthavasam* [17]. See also per Cotton, L.J. in *Hunt* v *Clarke* [52] per Lord Reid in *The Sunday Times Case* [29]). Despite the two passing references to "technical contempts" which I have referred to, our decisions do not require us to become entangled in the web of "technical contempt".

I agree, however, that, upon the application of the *de minimis* principle, there can be no contempt of *which a court would take*

congnizance if the obstruction or prejudice is not real but rather, trifling, far fetched, remote or merely theoretical and in that sense *technical, (Cf. Anon* [69]; *Powis* v *Hunter;* [70] *Matthews* v *Smith* [71]; In re *General Exchange Bank* [72]; In re *London Flour Co. Ltd* [73] ; *Vernon* v *Vernon* [74]; *Buenos Ayres Gas Co.* v *Wild* [75] ; *Hunt* v *Clarke* [52]: *Metropolitan Music Hall* v *Lake* [76] ; *Laurene* v *Ambery* [77]; *In re Rochester Election Petition* [78]: *In re Evening News and Post* [79]; *In re Pontefract Election Petition*[61] ; *In re Martindale*[80]; *In re Certain News papers, Duncan* v *Sparling*[81] ; *Ex parte Foster* [82]; *In re E.Wilson Gates* [83]: *Kelly & Co.* v *Pole* [84]; *Fielden* v *Sweeting* [85]; *R* v *Payne and Cooper* [86] ; *Fairclogh* v *Manchester Ship Canal* [86] ; *Fairclough* v *Manchester Ship Canal Co.* [87]; *In re Hooley, ex P. Hooley* [88]; *Shaw* v *India Rubber Co. Ltd* [89] ; *In re New Phillips* v *Hess* [91]; *In re Marquis Townshend* [92]; *R v Daily Mail* [93]; *Ex p. Stark* [94]). The circumstances of the case, including the statement, the occasion and place of its utterance and the status of a respondent, are no doubt considerations relevant to the pupose of evaluating the extent of obstruction or degree of prejudice of a statement complained of. There is nothing in the circumstances of this case, however, that induces me to consign the statement in question to the realm of venial trifles. As far as I can ascertain, there is nothing in the decided cases supporting the proposition that merely because a statement comes from a politician, at a political meeting, the *de minimis* principle should become automatically applicable.I am reluctant to accept the invitation to relegate the speeches of all politicians made at all political meetings to such a lowly position.

Having said that, I should like to say this. The Constitution has clearly defined our roles as legislators and judges as to how the sovereignty of the People shall be exercised. The judicial power of the People, in terms of Article 4 (c) can only be exercised through the courts, tribunals and institutions created and established or recognized by the Constitution or created and established by law, except in regard to matters relating to privileges, immunities and powers of Parliament and of its members, wherein the judicial powers of the People may be exercised directly by Parliament according to law. Except as permitted by the law, politicians and other persons such as editors and reporters, are not, to use the words of Woodrenton, C.J. in the matter of *Armand de Souza* [1], "at liberty to invite themselves into the judgement seat, and to scatter broadcast imputations such as those with which we have here to do.

"It is today, as Chief Justice Abrahams said in 1936 in *Abdul Wahab* v *A.J. Perera et al.* [12] as important as ever to realize that those people who have the privilege of making laws which govern us "have also the stern obligation of obeying those laws." See also the observations of Poyser, S.P.J. in re *Ratnayake* [15] quoted below with regard to the need to deter members of the Legislature from interfering with the administration of justice by imposing suitable punishments on those who do interfere.

Even if it is conceded that the judges and the witnesses were not influenced or likely to be influenced in the case before the Court, that does not end the matter, for there is, in deciding whether the *actus reus* was committed, the need to consider the effect of the statement on the administration of justice as a continuing process. Thus where there was intemperate criticism of a judge in his conduct in a particular case (as for instance in re *De Souza* [1]) or a jury after a case was concluded (as for instance in *Capper and Capper* [64]), or where there was a scandalizing of a judge by unfair critcism of his conduct in general (as for instance in the matter of *Armand de Souza* [1]) or where there was culpable criticism of the general body of judges or a group of judges (as for instance in re *Hulugalle* [2]; and in re *Wickramasinghe* [19]), there could have been no prejudice to a particular case. Yet the acts were held punishable, the object of the law of contempt in such cases obviously being to ensure public confidence in the administration of justice as a continuing process, rather than to ensure that the course of justice was not impeded or obstructed in a particular case. The jurisdiction of the Court exists not only to prevent harm in a particular proceeding before the Court but, in the public interest, also to prevent similar harm arising in other cases, (see *Attorney-General* v *Vaikunthavasan* [17] per Basnayake, J.), and to preserve the authority and power of the Courts for the benefit of future litigants. (See per Abrahams, C.J. in the matter of a rule on *Hulugalle)* [2] In the matter of *Armand de Souza,* [1] Woodrenton, C.J. at p.40 quoted with approval the following words of Justice Wilmot in *R.* v *Almon* (supra): The Constitution has provided very good and proper remedies for correcting and rectifying the involuntary mistakes of Judges and for punishing and removing them for any voluntary perversions of justice. But if their authority is trampled upon by pamphleteers and news writers, and the people are to be told that the power given to the Judges for their protection is to be prostituted to their destruction, a Court may retain its power

for some little time, but I am sure it would instantly lose all its authority, and the power of the Court will not long survive the authority of it. "(Cf. In the matter of a rule issued on *Capper and Capper* [64]).

In re *Ratnayake* [15] the respondent had written to a Judge requesting a postponement of a case explaining that a party against whom a warrant had been issued for failure to appear in Court on summons, was in a delicate state of health. Poyser, S.P.J (Keuneman and De Kretser, JJ. agreeing), was of the view that a contempt of court had been committed. In support of his view, at p. 101. Poyser, S.P.J. quoted the following remarks of Lord Chancellor Cottenham in *Dyce Sombre* [95]: "Every private communication to a Judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought more frequently than it is, to be treated, as what it really is, a high contempt of court. "Poyser, S.P.J. then said that although the contempt was not a "serious one", yet it was properly the subject of a judicial action particularly in view of the fact that the act in question had been committed by a person who was not only an Advocate but also a Member of the Legislative Council. He said that "Persons in the position of the respondent must be made to realize that they cannot interfere in the course of justice, and that if they do interfere, or attempt to interfere, they will be punished."

In Attorney-General v *Vaikunthavasan*[17] Basnayake, J. (as he then was) said: "When dealing with the question of punishment, it must be remembered that the jurisdiction of the court exists not only to prevent the mischief in this particular case but also to prevent similar mischief arising in other cases."

Lord Diplock in the *Times case* [29] said: "The mischief against which the summary remedy for contempt of court is directed is not merely that justice will not be done but it will not be manifestly seen to be done. Contempt of court is punishable because it undermines the confidence not only of the parties to the particular litigation but also of the public as potential suitors in the due administration of justice by the established courts of law."

In *Almon's Case* [24] the proceedings against Almon, who had in 1965

published libels upon the Court of King's Bench failed on technical grounds, but Wilmot, J in his notes (Wilmot's Notes, 97 ER.94) said as follows: "The arraignment of the justicé of the Judges, is arrainging the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges and excites in the minds of the people a general dissatisfaction with all judicial determination, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open and uninterrupted current, which it has for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth."

Learned President's Counsel for the respondent submitted that the offence of contempt of this kind requires *publication* by the contemnor. I agree. Publication involves no more than communicating information from one person to another. In this way, as the material was handed from reporter to sub-editor to printer and to the proof readers and to the editor and news vendors, publication would have taken place over and over again. In *Ragupathy's* case (34) where the material complained of was in a petition of appeal, Keuneman, S.P.J. at p. 299 said: "But even a petition of appeal of the kind we are dealing with passes through many hands, viz., the persons who prepare and type it, officials at the jail, officers of the Supreme Court Registry, and others who have access to it." The respondent did publish the statement.

These would be merely internal and private publications of the speech which were not seen by the judges or potential witnesses or by persons connected with the case. There being nothing that could by such limited publication interfere with or prejudice the judges or witnesses, there would have been no act of interference with the particular case; and even if there was some prejudice with regard to the administration of justice as a continuing process, it would have been an act of such insignificance that the Court would not have taken cognizance of the act. But these matters, although rolled up

on the no-publication-argument, have nothing at all to do with the question whether the respondent published the statement.

With regard to the question whether the respondent published the *statement in question,* namely, the article in the newspaper, learned President's Counsel for the respondent submitted that the respondent did not, *cause* that publication and therefore he did not publish the statement. The respondent, he said, was a mere reporter who collected the information and passed it on to the editor and that the decision to publish and the responsibility for the publication was that of the editor. True enough, in the preceding year, only 35 of 250 reports submitted by him had been made use of by the newspaper. Yet, the respondent's offending report, albeit one of the exceptional pieces he turned out, was actually published in the newspaper. The reporter in this case did much more than supply information.: He was the author of the article and in every sense he was a party to the publication just as the reporter was in the *Odham's Press* case (supra). The activities of the respondent as a reporter may not have been the case of the contempt, but it was at least a *concurrent cause.* His activity in this case, no less than that of his editor, *completed* the causal explanation of the act in question, namely the making of the speech by Mr. Senanayake at Aranayake and its publication in the *Divaina* newspaper. The action of the editor in deciding to publish the report of the respondent did not *break* the causal explanation. Whatever may have been usually done with his reports, the fact remains that in this instance, and that is all that concerns us, not only was it used, but his report, except for the addition of the headline, was almost entirely reproduced in the newspaper and published to the public. Would it then be reasonable to say that the reporter in this case did not publish the statement I do not think so.

The *actus reus* has, therefore, been established.

The only question that remains is whether the respondent should be excused if, as he claims, he had no intention of publishing the statement and that he had no intention of causing disrepute or disrespect to the Supreme Court or any Court, and that he did not intend to obstruct the petitioner's case. In other words, the respondent submits that he ought to be free from liability because there was no *mens rea.*

The learned Attorney-General suggested that questions of contempt of court belonged to the realm of "strict liability" and that, therefore, the intention, the question *quo animo* the offence was committed, was irrelevant except to the question of punishment. I agree that intention is of crucial importance in deciding upon punishment. The absence of intention to obstruct or prejudice the course of justice has consistently been taken into account by the Supreme Court with regard to the question of punishment. Thus in *Hewamanne* v *De Silva and Another* [3] Wanasundera, J. at pp. 110 - 111 confirmed the rule but did not impose any punishment on account of the fact that the respondents did not have a "deliberate intention of interfering with the administration of justice though the publication had that effect." Abdul Cader, J. at p.195 desisted from imposing a punishment in the absence of "malice".

There is, however, a large and debatable penumbra of uncertainty and vagueness with regard to the element of *mens rea* in the offence of contempt. As Borrie and Lowe *(Law of Contempt* 1983, 2nd Ed. at p.70) point out, "the application in general of the doctrine of *mens rea* to criminal contempt is not entirely clear." Arlidge and Eady *(The Law of Contempt,* 1982), at pp.155 - 156 state as follows: "The nature of the *mens rea* required is still an open question. Before the passing of the 1981 Act there were various decisions which indicated a particular *mens rea* was required in certain forms of contempt, but nowhere has a general definition been attempted".

Glanville Williams *(Textbook of Criminal Law* 2nd Ed. at p. 929 note 2) states that although the offence of contempt has been said to be an exception to the general rule laid down by Cockburn, C.J. that *mens rea* is "the foundation of all criminal justice", "how far this is true has never been altogether clear . . .Contempt of court was perhaps a crime of strict liability in certain respects at common law. . ."

It seems to me that, in general, in the case of the offence of contempt of court, it is the addition of *mens rea* to the *actus reus* that completes the offence. As Wilmot, J. at p.102 held in *Almon's Case* (supra), *Actus non facit reum nisi mens sit rea* is a part of the offence of contempt. (See also *Metropolitan Music Hall* v *Lake* [76] *Marquis Townshend* [92] ; per Denning, M.R. in *A. - G.* v *Butterworth* [96] per Claasen, J. in the South African case of *S* v *Van Nieker* [97].) But see per Donovan, L.J. in *Butterworth's Case*

[96]; per Goddard C.J. in *R* v *Odham's Press Ltd, ex p. A -G* [6]; *ex p. Jones* [10] per Lord Erskine, L.C.; *St. James Evening Post Case* [9]) The Privy Council in *Reginald Perera* v *The King* [8] in holding the respondent free from liability took into account the fact that he had acted in good faith. Again, in *Vidyasagara* v *The Queen* [45] Lord Guest in delivering the decision of the Privy Council at p.27 said "The questions, therefore, which were before the Supreme Court were (1) whether the statement . . . brought the Court into disrepute and (2) if so, whether the statement was made without sufficient reason." It appears, therefore, that the Privy Council was not regarding the offence of contempt as one which imposed an absolute liability. The Privy Council in *Vidyasagara's Case* at p.28 found that the offensive statement was "deliberate and unnecessary in the circumstances" and affirmed the decision of the Supreme Court.

A person is not guilty of the offence of contempt unless there was *mens rea* as the law may require with respect to each material element of the offence. With regard to the element of publication, which as we have seen has been established in this case, it is necessary that the publication was intentional. In *McLeod* v *St. Aubyn* [11], where a newspaper printed certain letters containing abusive and derogatory comments on the Chief Justice of St. Vincent, but the accused had merely lent a copy of the newspaper to the librarian of a library that had not received its copy, the Privy Council held that the accused had not committed a contempt, for, as Lord Morris who delivered the judgment said at p.562: "It would be extraordinary if every person who innocently handed over a newspaper or lent one to a friend with no knowledge of its containing anything objectionable, could thereby be constructively but necessarily guilty of a contempt of court because the said newspaper happened to contain scandalous matter reflecting on the court."

The correctness of the decision in *McLeod's Case* was accepted by Lord Goddard, C.J. in *R* v *Griffths, ex p. A. - G.* [5]. "We should", the Chief Justice said, "take the same view".

The article in the case before us was, except for the headline, in the exact words of the respondent and he can hardly claim that he was not aware of its contents. Moreover, since his payments depended on publication, he must have hoped very much that this, as indeed all his other contributions, would be published. In the

circumstances, the respondent can hardly claim that he did not *intend* the publication of the statement in question. I think he intended the publication in the sense that it was his conscious object that his report would be published.

Although it was really the person in charge of the provincial news desk who had checked the report and authorised the publication in the matter before us, the editor had accepted responsibility for the publication and he had been already punished for contempt of court. To publish or not, learned President's Counsel for the respondent submitted, is the decision of an editor. It is his responsibility to scrutinize a text that had been forwarded by a reporter and to identify and expunge deleterious and noxious material.

It is a tradition of journalism as well as a rule of law that, because of his ultimate and overall control, an editor is responsible for and takes responsibility for what is published in his paper. (See *Re O'Connor, Chesshire* v *Strauss* [98] *R* v *Evening Standard Co. Ltd. ex* [99] ; *R* v *Odhams Press Ltd. ex p.A - G* [100]. See also *The Queen* v *D. Peries* [18]). The editor is responsible whether he deliberately published the article in complete disregard for the due administration of justice, as for instance in *R* v *Bolam ex p. Haigh* (101) whether he had no personal knowledge, as for instance in *The Queen* v *D.Peries et al* (18); *Re O'Connor, Chesshire* v *Straus (supra) ;* ex *p.A - G* (100), and whether he bona fide believed in the truth of the report (as in *R* v *Evening Standard Co. Ltd* (99)) and whether he was not the writer of the article (as in re *Hulugalle* (2).) In the matter of the rule on *De Souza* (68), the editor denied the charge and insisted on proof of the fact that he was the editor. Pereira, J. regarded this as an aggravating circumstance.

However, learned President's Counsel for the respondent submitted that reporters are not in the same position as editors. In support of his view be cited the comment of Chief Justice Lord Goddard in *R* v *Griffths ex p.A - G* [5] that "The offence is not a mere preparation of the article but the publication of it during the proceedings . . .It has never yet been held that a reporter who supplied objectionable matter to his editor or employer, which the latter published, is himself guilty of contempt."

As learned President's Counsel quite properly pointed out, Lord Goddard must have overlooked the decision in *R* v *The Evening*

Standard Ltd [99] where a reporter who telephoned the offensive material to his editor was found guilty of contempt.

In the same year as the *Griffths* case, a reporter who wrote the offending article was found guilty of contempt and fined in the case of *R* v *Odhams Press Ltd ex p. A - G* [6] Reporters are not necessarily free from liability. And the case before us is not the first case in this country when a reporter has been asked to show cause why he should not be punished for contempt of court. For example in re *U.P. Jayatilake* [33] a correspondent of the *Ceylon Daily News* was asked to show cause, although in that case he was not held liable because a magistrate who had no jurisdiction to do so had called upon the reporter to show cause why he should not be dealt with for contempt.

I am of the view that reporters who supply information to a newspaper are responsible for the publication as the editor. Borrie & Lowe, *op. cit.* p.250 state that: "The principal persons who can be said to bear a real responsibility for a newspaper or magazine publication and who can, therefore, be regarded as intending to publish are: the editor, the proprietors, the printers, the persons supplying the information to the newspapers such as a reporter or news agency and, lastly, the persons responsible for the distribution of the newspaper." Arlidge and Eady, *op.cit.* at p.128 point out that although within a newspaper a reporter publishes to a sub-editor and so on and not to the public at large, yet he is a party to the publication in the newspaper and he is liable on the basis that he intended the publication. "Obviously", they say, "a reporter or news editor intends that matters he supplies shall be published, although others may have a discretion to exercise it."

I have already held that in this case the respondent did intend the publication in the sense that he desired it, that publication was a conscious object of submitting his report to the editor. Even if I am prepared to hold that the reporter did not intend to publish in that sense, he must be held liable on the basis that he was heedless of the risk that publication was highly probable, or having regard to his past experience that some of his contributions were published, that publication was a reasonable possibility. Considering the nature and purpose of his conduct and the circumstances known to him, he was guilty of a deviation from the standard of care that would have been exercised by a reasonable man in his situation and he must,

therefore, be held liable.

If the respondent intended the publication, does that end the matter? According to some decisions, that would appear to be the case.

In *Hewamanne* v *de Silva* [3] Ranasinghe, J. (as he then was) said at p. 141 that in view of his decision with regard to the defence of privilege it was unnecessary to consider the contention put forward with regard to *mens rea*. However, Ranasinghe, J. added: "Even so, in view of the fact that there has been considerable discussion of this matter, I would merely give an indication of what seems to be the position, in law, in regard to this matter. Having regard to the various decisions - from the English, Indian, Australian and also our own courts - and also the discussions of the several authors of text books, it seems to me: that the mental element required to be established is merely an intention to publish the impugned, objectionable matter; that an intention to bring the judge or the court into hatred, ridicule or contempt and interfere with the due administration of justice on the part of the offender is not a required ingredient of the offence of contempt of court." At p.171 Ranasinghe,J. stated as follows: "No allegation of malice has been made against either of the respondents by the petitioner in his affidavit; and learned Queen's Counsel did also, in the course of his submissions, state that no such allegation is being made. There is no reason why the 1st respondent's assertion that his was an act done bona fide and solely for the purpose of supplying information to the public should not be accepted."

There are other cases, which seem to support Ranasinghe, J.'s view that intention, apart from an intention to publish, is not a necessary ingredient of the offence of contempt.

In *Veerasamy* v *Stewart et al* (16), the editor and publisher of the *Times of Ceylon* were charged with contempt in respect of certain editorials, letters and reports of a speech appearing in their newspaper referring to proceedings in a Magistrate's Court which were likely to prejudice a fair hearing. The case, Soertsz, J. said at p.482, afforded an illustration of what he believed "has been the experience of nearly every one of us, that we have slipped into saying things we did not intend, or that we have said more or less than what we meant." His Lordship said that he was satisfied that in publishing these articles "it was not the purpose of the respondents

to prejudice the petitioner and his co-accused, or to interfere with the course of justice" Soertsz, J. then added as follows: "But, unfortunately for the respondents, that is not an end of the matter. As Harris, CJ. said in the case of *Superintendent of Legal Affairs Behar* v *Murali Manohar* (102) "It has been frequently laid down that no *intent* (emphasis is his) to interfere with the due course of justice, or to prejudice the public need to be established if the *effect* of the article or articles complained of is to create prejudice, or is to interfere with the due course of justice". His Lordship then proceeds to the question of the meaning of the words complained of and states that what is relevant is not whether the publication in fact interferes but whether it tends to interfere with the due course of the administratioin of justice. Soertsz, J. then says: "Therefore, in view of my finding that the respondents did not intend to interfere with the course of justice, it is sufficient for me to address myself to the question whether these publications tend to prejudice the petitioner and the other accused, by interfering with their right to a fair and impartial trial." After stating that the prejudice should not be remote or far-fetched, Soertsz, J. at p.483 quotes the observations of Lord Hewart, C.J. in *Gaskell and Chambers Ltd.* [103]that "The applicant must show that something has been published which is either clearly intended or at least, is calculated to prejudice a trial that is pending" and analyses the dictum in the following terms: "the conditions laid down in it for the exercise of the jurisdiction appear to be (a) a pending trial: (b) a publication *intended* or *calculated* to prejudice the trial." The emphasis was that of the learned Judge. Having said that the respondents when they wrote the articles were "well aware of the pending case", his Lordship states that the first condition was therefore satisfied. Soertsz.J. then says: "In regard to the second condition, I have observed already that I am satisfied that the respondents did not intend to prejudice the accused by interfering with their right to a fair trial. The sole question that remains is whether these publications are calculated to prejudice the accused in that way. Commenting on this phrase "calculated to prejudice" in the case of *R* v *Tibbits* (55) Lord Alverstone, C.J. said: "The essence of the offence is conduct calculated to produce, so to speak, an *atmosphere of prejudice* in the midst of which the proceedings must go on." Soertsz, J. then examines the meaning of the words complained of at p.487 and holds that "although the respondents had no intention to cause prejudice, the publications for which they admit responsibility are calculated to produce an atmosphere of prejudice in the midst of which proceedings must go on and in that way they

tend to interfere with a fair trial of the case". He concludes by observing that the respondents entertained the opinion that they were entitled to comment in the way they did but finding that they were in error, they had apologized to Court. In all these circumstances and particularly in view of the fact that it was not the purpose of the respondents to cause prejudice or to interfere with the course of justice, the rule was *discharged.*

"Calculated to prejudice" may mean *likely or having a tendency to prejudice.* The phrase may also mean *intended to prejudice.* To say that contempt is committed if the statement is likely or has a tendency to prejudice even though it may not in fact have that effect, or was not intended to have that effect is a matter relevant to the question of *actus* reus. Whether intention for the purpose of *mens rea* existed is, with great respect, a separate question. As the editor and publisher of the newspaper, the respondents did not deny and could not have denied that they intended publication. What they did deny was the existence of an ulterior intention and that fact resulted in the rule being discharged.

In the matter of a rule on *Ragupathy* (34), Keuneman, S.P.J. (Soertsz, A.C.J and Wijeyewardene, J. agreeing) said at p.298 as follows: "In his affidavit the party noticed has averred that he had no intention to convey a sinister or derogatory meaning. That, however, even if true does not conclude the matter." Keuneman, S.P.J. then quotes the test formulated by Woodrenton, C.J. in *Armand de Souza* (supra) for ascertaining the meaning of the words, viz. how would the majority of those who it reached interpret the words. In discussing the question of punishment at p. 299, Keuneman, S.P.J. states that "It is very likely that the party noticed did not intend to convey the full meaning which the words would ordinarily bear," but finding that he persisted in maintaining that the words were not "offensive and derogatory to the Judge", his humble expression of regret for having made the statement was not a sufficient apology which could be taken in mitigation and accordingly sentenced him till the rising of the Court and also fined him. It is of importance in deciding whether the *actus reus* has been committed what imputation is conveyed by the words complained of. What imputation is conveyed by any particular words is, as I have said, to be determined by an objective test so as to exclude the meaning intended by the man who published the words. Keuneman, S.P.J. seems to support this view. But since the respondent persisted

in saying that the appropriate imputation was the meaning he intended, rather than frankly admitting that the imputation attributed by the Court was not what he had intended and endeavouring to show that his failure to perceive it was not culpable, he was punished.

In *Queen* v *Pieris* Sri Skanda Raja. J. said at p.374: "In this case I find it difficult to accept what the reporter in question avers in his affidavit. Having by his *negligence* put the respondents into trouble he seems to attempt to save himself and his job. An affidavit from his brother who is alleged to have acted as his substitute has not been filed." At p.375 he concludes as follows: "Though no intention to prejudice the minds of the jury against the accused can be imputed to the respondents, this publication was calculated to or tended to do so. And that is enough to constitute contempt. Intention is not a necessary element in a matter of this kind." It seems clear from both the judgments of Sri Skanda Rajah,J. and of T.S. Fernando. J. that the respondents in that case were guilty of negligence.

On the other hand, there are other decisions which clearly suggest that malice will make a respondent liable and that good faith will free him from liability. In *Hewamanne* v *De Silva* (supra), although Ranasinghe, J. had, as we have seen, stated *obiter* that intention, beyond intention to publish was, not a part of the offence of contempt. His Lordship at p.173, however, with great respect correctly, includes the element of absence of malice in formulating the defence of privilege. His Lordship said: "a consideration of the question, which arises upon the plea put forward on behalf of the respondents. . .leads me to the view that the protection granted by the common law to a fair and accurate report of proceedings of Parliament without malice and solely for the information of the public though it contains defamatory matter also protects a fair and accurate report of a proceeding of Parliament, such as "A", published without malice and solely for the information of the public and the publication of which has not been prohibited by Parliament even though such report contains matter which would have otherwise rendered the publisher liable to be dealt with under that branch of the law known as "scandalizing a judge or Court".

In *Reginald Perera* v *The King* (8) the Privy Council applied the test in *Reg* v *Gray* [7] that there must be involved "some act done or

writing published calculated to bring a Court or a judge of the Court into contempt or to lower his authority "or something "calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts. Lord Radcliffe at p.296 then said: "What has been done here is not at all that kind of thing. Mr. Perera was acting in good faith and in discharge of what he believed to be his duty as a member of the Legislature. His information was inaccurate, but he made no public use of it contenting himself with entering his comment in the appropriate instrument, the Visitors Book, and writing to the responsible Minister. The words that he used made no direct reference to the Court, or to any judge of the Court, or indeed to the course of justice, or to the process of the Courts. What he thought that he was protesting against was a prison regulation, and it was not until some time later that he learnt that, in so far as a petitioner had his petition dealt with in his absence, it was the procedure of the Court, not the rules of the prison authorities, that brought this about. Finally, his criticism was honest criticism on a matter of public importance. When these and no other are the circumstances that attend the action complained of there cannot be contempt of Court." The respondent it seems was exonerated on two grounds: (1) the absence of a statement that was in nature contemptuous and (2) the fact that he had acted in good faith.

In the matter of *Capper and Capper* [64], the proprietors and publishers of the *Times of Ceylon* were ordered to show cause why they should not be punished for contempt of court by holding up to public odium and ridicule the jury who had tried a certain criminal trial. The trial was over in this case and so there was no question of interfering with pending litigation. The contempt, therefore, was concerned with future litigation. The respondents said that in criticizing the conduct of the jury, they did not intend to scandalize the Court, no contempt was intended, that the act was bona fide without malice, that the highest respect was entertained by them for the Court and that they regretted the act. Bonser, C.J.(Lawrie and Withers, JJ, agreeing) held at p.320 that "The proprietor has stated that he had no wish to interfere in any way with the administration of justice or to insult the jury; that he did not know that that was the result of his acts - in other words that he did not know any better; and the Court accepts the apology and explanation which has been offered, and the order will be that no order will be made in the matter."

It would seem that the Court did not take cognizance of the alleged contempt because the *actus reus* was absent, nor because an intention to publish was absent, but because there was no intention of disparaging the members of the jury or interfering with the administration of justice as a continuing process.

In *Kandoluwe Sumangala* v *Mapitigama Dharmarakitta et al* [25] an application was made by Mapitigama Buddha Rakkita for a rule *nisi* on Tibbotuwe Siddhartha Sumangala Maha Nayake of the Malwatte Chapter, (the first respondent) who had in a proclamation issued while an appeal was pending, characterized the evidence given by two priests in the Court of law from which an appeal had been preferred, as being "suppressive of truth and upholding falsehood, and the *alleged editor* (the second respondent), and the printer and publisher (third respondent of the *Sarasavi Sandaresa* who had reproduced the statement Woodrenton, J. (at p.201) said that he had "no hesitation in holding that this is a clear case of contempt of Court". According to Woodrenton, J. (pp.200) in fin. - 2011), the main defence in the case was that set out in the affidavits of the first and third respondents, the author of the proclamation and the printer and publisher respectively, namely, that they had not intended to commit a contempt of Court and that "there were, in any event, circumstances which constituted a great mitigation of any offence that could be laid to their charge." His Lordship was "quite prepared. . . to accept the good faith of the allegations contained in these affidavits." In conclusion, Woodrenton,J. at p.202 said: "In regard to the present case, it appears to me that in view of the affidavits of the first and third respondents, and of the apologies in these affidavits, the ends of justice will be met if the present rule is discharged, with costs to be paid by those respondents to the application. As regards the second respondent, I think that his affidavit shows that he is in no way responsible for the publication complained of. His name does not appear on the pages of the *Sararsavi Sandaresa,* and I do not think that the mere fact that his name does appear in the almanac which Mr. A. St. V. Jayewardene has shown us should be allowed to override the terms of his affidavit, to the extent of his being called upon to pay any share of the applicant's costs of the present motion. I should propose, therefore, as regards the second respondent, simply to discharge the rule, making no order as to costs."

Grenier, A.J. at p.202 agreed "entirely" with what had "fallen" from his brother.

If the rule was *discharged* although there was, as Woodrenton, J. said, not once, but twice at P. 201 that he had "no hesitation in holding" that there was a contempt of Court, it would seem that although he was satisfied that the *actus reus* was established, there was no *mens rea* and that, therefore, the respondents were not liable. However, there was an award of costs against the first and third respondents. On the other hand, the rule against the second respondent was not only discharged, but no order as to costs was made against him because there was no evidence that he was in any way "responsible" for the publication complained of. Perhaps he was in fact not the editor and therefore he was not in a situation requiring the nature and degree of care required of such a person? This is not expressly stated in the judgment, but it seems to be a reasonable inference. It would seem that if he was in fact the editor, the second respondent might also have been held "responsible" and liable to pay costs.

In re Ratnayake [15] the contempt was held to be not a serious one, but nevertheless one which deserved to be dealt with by court. However, in view of the fact that it had been admitted that the letter should not have been in the form in which it was written and since an apology was made, the rule was *discharged* with a warning to the respondent.

Learned President's Counsel for the respondent submitted that there was no deliberate and wilful intention of scandalizing the Court or of causing prejudice to the administration of justice. On the basis of the *dictum* of Ranasinghe, J. in *Hewamanne's Case* at p. 173, and the decisions in the cases of *Reginald Perera, Capper, Kandoluwe Sumangala* and *Ratnayake,* it may seem that the rule in this case too should be discharged. However, it has been held in other cases that it is not sufficient for a respondent to establish that he had no intention to scandalize or to interfere with the course of justice if it is established as a fact or inferred from the circumstances that his conduct was an antecedent but for which the result in question would not have occurred and that he foresaw or ought on account of his position to have foreseen that the result was at least a reasonable possibility. This, I believe, is the effect of the decisions in *De Souza, Wickramasinghe, De Mel Laxapathy, Hulugalle, Abdul Wahab,*

Jayasinghe, Peries and *Vaikunthavasan.* Obviously, since negligence suffices, if a respondent acts puposely, knowingly or recklessly, he will be liable.

In the matter of the rule on *De Souza* [68], the Editor of the *Ceylon Morning Leader* was before the Court. He had made false and fabricated statements about a criminal trial that had been recently concluded. He had alleged that the presiding Judge was guilty of being harsh, unreasonable and vexatious. *Pereira, J. at p. 45 said* that "Whether all this was the result of a mere itch for vituperation of those in high authority in the country, or a desire to advance the interest of a newspaper by pandering to the morbid tastes of a clientele craving for claptrap and sensationalism makes little difference." At p.46, Pereira,J. found that the respondent had indulged in "*a game of reckless and impudent attack on the Judge*". Observing that, although the respondent had aggravated his conduct by omitting to admit "fairly and squarely that he was the editor of the *Ceylon Morning Leader* newspaper and insisting on proof of that fact", he had, nevertheless, albeit tardily, tendered an apology in which he unreservedly withdrew the insinuations made by him and expressed his regret. He was found guilty and fined.

The other case against De Souza as well as *Wickramasinghe's Case* also seem to rest on the basis of recklessness in the sense of a conscious disregard of a substantial and unjustifiable risk of interference with the administration of justice or, having regard to the respondent's position, a gross deviation from expected standards of conduct.

In the matter of *Armand de Souza,* [1] the Editor of the *Ceylon Morning Leader,* it had been alleged in an editorial article entitled *Justice at Nuwara Eliya,* that the Judge, Mr. Hodson, presiding over the Nuwara-Eliya and Hatton areas did not exercise his own judgment but allowed himself to be influenced by the Police and that he favoured the European planting community and could not be relied upon to do justice when a European planter was a party to a legal proceeding.

In a statement read to Court, de Souza said that upon receipt of complaints from several proctors and others of "the irregular methods and impatient temper of Nuwara-Eliya Judge", he visited the Court "and was satisfied of the truth of the complaints after making full

inquiries from those present." De Souza said that he himself observed that "the Judge arrived at about 11.30, tried cases in chambers till about 1.50, and then came on the Bench for about 10 minutes, and got through a considerable amount of work in excessive haste, postponing some cases because his train was coming, and leaving about fifteen others entirely untouched. I came back, and in due time wrote two editorials . . .

I did not know the Judge, and had never, to my recollection, written about him. I have no feeling whatever against him. I acted throughout from a sense of my duty as a public journalist, anxious for the safer and more careful administration of justice both at Hatton and at Nuwara Eliya. I intended no contempt of his Court, and nothing was further from my thoughts and intentions than to bring the administration of justice into contempt; my object and anxiety throughout being the exact contrary, namely, that the people of Hatton and Nuwara Eliya should have justice administered to them in a manner calculated to inspire better confidence in the administratiion of justice. I gathered that the people were disatisfied and felt aggrieved."

He admitted that although Hodson had "honestly and conscientiously exercised his own judgment", yet he had allowed such judgment to be "influenced by statements and statements improperly made by the police". He also admitted that there was no room for any suspicion of unfairness on the part of the Judge, that this man Hodson had done his duty "conscientiously" and that he was "a straight, honest, man", that he was, with regard to the allegation of favouring Europeans, "mistaken in the methods adopted."

De Souza was convicted and sentenced to undergo one month's simple imprisonment.

In re *Dr. S.A. Wickramasinghe* [19] the respondent, a well-known politician, had at a public meeting scandalized the judiciary. He admitted he had no cause to show why he should not be punished but explained that he had intended to criticize the police and not the Courts and expressed his regret for "unintentionally" breaking the law by criticizing the Courts. Gunasekera, J. (Gratiaen and Pulle, JJ. agreeing) said at pp. 512-513 that: "It is idle for the respondent to pretend that he did not intend to bring the judiciary into contempt; though it may be true that he did not know at the time that this

'general criticism' of the judges amounted to a contempt of court and in that sense it was 'unintentionally' that he broke the law". The Court did not regard his expression of regret as a sufficient apology and imposed a sentence of imprisonment in addition to a fine.

In *Attorney-General* v *M. De Mel Laxapathy,* [13], the respondent claimed that the offensive notice which he had caused to be printed and published was in the Sinhala language with which he was not well acquainted, that he had no ill-feeling against the accused persons, and that it did not occur to him that they were likely to be thought as guilty by reason of what was stated. Abrahams, C.J. (Maartensz and Moseley, JJ. agreeing) was prepared to believe that the respondent "*did act without due care and attention*" in the preparation of the offensive notice regarding a pending case. The Court was prepared to believe that he had "no intention of prejudicing the fair trial of this case", but nevertheless fined him.

In the matter of a rule on *Hulugalle* [2], the respondent who was the editor of the newspaper in which the article in question appeared stated in his affidavit that he was not the writer. He denied that the passages complained of contained the meanings attributed to them in the Rule and protested his respect for the Judges and said that if he had thought that the passages bore the meanings attributed to them, whether the same amounted to contempt or not, he would not have permitted publication. The respondent had not apologized. With regard to the defence that he was not the writer, Abrahams, C.J. at p.308 said that the editor had passed the matter for publication and that his responsibility was "therefore hardly less than if he had written it." He was imprisoned until the rising of the Court and fined.

In *Abdul Wahab* v *A.J. Perera et al* [12], where pending a criminal charge against a person, the respondents distributed among the public a leaflet suggesting that the accused was guilty of the offence with which he was charged, Abrahams,C.J. (Koch and Moseley, JJ. agreeing) said: "As to whether the respondents actually intended to prejudice a fair trial or not, we are of the opinon that *they never stopped to think about it.* As is unfortunately not seldom the ways of men in such matters, they assumed the guilt of the accused and could not contemplate any other conclusion to the trial than his conclusion. But that they acted with deliberate malice against the accused is a matter which we do not hold to be proved." However, taking into account the fact that this was the first case when a

legislator had committed an act of contempt, that the respondents had not disputed the facts and not raised any technical points but had rather "submitted themselves fully and humbly to the judgment of the Court", the Court fined the respondents.

In *Jayasinghe* v *Wijesinghe et al.* [14], the respondents were signatories to published leaflets summoning a meeting suggesting that the accused in a pending case was guilty. Koch,J. at 71 said: "Now, it is true that the name of the petitioner does not appear in the notice convening the meeting, and it may be that the word "murder" was not used intentionally, but the use of that word in the notice *for which the respondents were responsible* was bound to create the impression that the person charged or who would be charged was guilty . . .and thus prejudice that person in obtaining a fair trial". The respondents were found to be guilty of "interfering with the due administration of justice" and fined.

In *The Queen* v *Peries et al* [18] the respondents admitted they had no cause to show why they should not be dealt with for publishing in their newspaper comments on a pending case which were likely to interfere with the administration of justice. They expressed their deep regret and tendered apologies to the Court. The first respondent, the editor, accepted full responsibility for the offending publication, although he had not seen the report prior to publication. The report had been passed for publication by a sub-editor in the belief that the correspondent's report was accurate. With regard to the submission of the sub-editor that he was unaware that the question of admissibility of a confession by the accused had been argued in the absence of the jury, T.S. Fernando,J. at p.373 remarked that the sub-editor had *"not observed the ordinary caution that should have presented itself to the mind of anyone holding a position like his when he read the reference to preliminary arguments about admissibility.* The editor had submitted an affidavit from the correspondent that he had not personally attended Court and that the report had been prepared by his younger brother. He said that he had been reporting proceedings in court for about two years and that if he had been aware that argument took place in the absence of the jury, he would not have forwarded the report in the form in which it was sent. T.S. Fernando,J. at p. 374 said that in that case too there did not appear to have been "an exercise of the ordinary caution" to which he had earlier referred to. T.S. Fernando,J. (G.P.A. Silva,J. agreeing) said: "While we are ready to accept the position

that the respondents did not intend to interfere with the administration of justice, it is undeniable that the publication actually made was calculated to prejudice the minds of the public and, more to the point, the minds of the jurors trying the case, Indeed that much is admitted in terms in the affidavits presented by or on behalf of the respondents. In these circumstances, taking into account the prompt expressions of regret and the apologies tendered, we deemed it sufficient to sentence each of the respondents to pay a fine of Rs 500 with a default sentence in the case of the 1st respondent (editor) of a term of two months simple imprisonment."

In *Attorney-General v Vaikunthavasan (17)* the respondent who was the editor, printer and publisher of a newspaper had published an article which was likely to prejudice the fair trial of a case that was then pending before a Magistrate's Court. He admitted the offence, but tendered his apologies to Court and explained that he had recently started the paper without any previous experience of journalism. Nagalingam,J. made the rule absolute but imposed "no further punishment." Basnayake, J. (Gunasekera, J. agreeing), however, taking into account the mitigating circumstances to not imprison the respondent, imposed a fine. It seems that as the editor, printer and publisher, the respondent was guilty of recklessness or negligence as to the result of the statement.

I hold that in this case the respondent had no intention to prejudice the case before the court or to obstruct or impede the administration of justice. I am also of the view that he did not know that the statement he prepared might bring about the consequences which in fact were brought about by his statement. However, I hold that as a newspaper reporter with certain responsibilities, the respondent ought, but failed, to have had the foresight to see that his report was likely to cause prejudice to the case before the Court and to the administration of justice as a continuing process. The respondent is, therefore, liable.

For the reasons stated in my judgment, the Rule is made absolute. There remains the question of sanctions. The punishment for contempt of Court was in ancient times very severe, and often cruel and barbarous. The old English cases show the ferocity with which persons were punished for contempts. Richard de Calton was adjudged to have his right hand cut off and his castles forfeited to

the King. But the King gave his lands to one of his own varlets and excused the defendant from losing his hand. James Williamson was less fortunate. He was a criminal convicted at the sessions held at Chester in October 1684. He threw a stone at the Judges on the Bench and had his hand cut off and fixed over the entrance gate of Chester Castle where it remained for some years. The punishment of the offence has now become comparatively merciful, the severest punishment being limited to fine or imprisonment although in some cases both are inflicted. It is also possible to bind over the offender to be of good behaviour or to accept an apology and order the respondent to pay costs. Sometimes the rule has been made absolute with no further order. Having regard to the fact that Contempt of Court is an offence purely *sui generis* and one that is vaguely defined; and taking account of the fact that cognizance of the offence involves in this case an exceptional interference with the fundamental right of freedom of speech and expression, including publication, guaranteed by Article 14 (1) (a) of the Constitution; and considering the fact that the respondent did not have the consequences of his act as a conscious object of his conduct; and considering that, although as a reporter he had duties and responsibilities yet his role in the publication was a comparatively subordinate one, no punishment is imposed on the respondent.

Rule made absolute.

No punishment imposed.