In The Supreme Court of Bermuda

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2011: 35

IN THE MATTER OF SECTION 15(3) OF THE BERMUDA CONSTITUTION ORDER 1968

AND IN THE MATTER OF AN APPLICATION ON BEHALF OF THE DEFENDANT IN MAGISTRATES COURT CASE NUMBER 10CR01221

BETWEEN:

CHARLES ROGER RICHARDSON

Applicant

-v-

LYNDON D. RAYNOR
(POLICE SERGEANT)

Respondent

JUDGMENT

(In Court)

Mr. Craig Attridge, C. Craig S. Attridge, for the Appellant
Ms. Cindy Clarke, Office of the Director of Public Prosecutions, for the Respondent
Mr. Melvin Douglas, Acting Solicitor-General, for the Attorney-General[1]

Date of Hearing: July 18, 2011
Date of Judgment: August 12, 2011

[1] In addition to these formal appearances, by agreement Written Legal Submissions on Behalf of the Media Legal Defence Initiative, prepared by Ms. Heather Rogers Q.C., were also tendered by way of an Amicus Brief.

INDEX

Introductory

1. The present case arises out of the interaction between statutory criminal defamation provisions enacted in Bermuda at the beginning of the 20th century and communications with "friends" through the medium of a global internet-based social network known as Facebook, which was established at the beginning of the 21st century. In the intervening years the fundamental right of freedom of expression was accorded both: (a) domestic legal protection under section 9 of the Bermuda Constitution with effect from February 21, 1968[2]; and (b) international legal protection when article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), together with the Convention as a whole, was applied to Bermuda by the United Kingdom Government on September 12, 1967[3].

2. On January 7, 2011, the Applicant was charged in Magistrates' Court on an Information laid by the Respondent with the summary offence of unlawfully publishing defamatory matter concerning Police Inspector C. The matter was adjourned to January 14, 2011 when the Applicant's counsel requested the Senior Magistrate to refer the question of whether Part XII of the Criminal Code and the Applicant's prosecution contravened his rights under section 9(1) of the Constitution. The Learned Senior Magistrate referred the matter to this Court pursuant to the provisions of section 15 (1)-(3) of the Constitution, which provide as follows:

> "**Enforcement of fundamental rights**
>
> *15 (1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*
>
> *(2) The Supreme Court shall have original jurisdiction—*
>
> *(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and*
>
> *(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,*
>
> *and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:*

[2] Schedule to the Bermuda Constitution Order-in-Council, UK S.I. 1968: 182.

[3] The competence of the European Commission on Human Rights and the European Court of Human Rights was initially accepted for Bermuda by the United Kingdom Government for successive five-year periods. Acceptance of the competence the Court for Bermuda on a permanent basis was only registered on November 22, 2010: htpp://conventions.coe.int.

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.
(3) If in any proceedings in any court established for Bermuda other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the foregoing provisions of this Chapter, the court in which the question has arisen shall refer the question to the Supreme Court unless, in its opinion, the raising of the question is merely frivolous or vexatious..." [emphasis added]

3. The application arose in the following way. The Applicant, a prominent criminal defence lawyer of African-Bermudian descent, who might fairly be regarded as too old to be described as young but too young to be described as middle-aged, was conditionally discharged for simple possession of a small quantity of cannabis found in his residence following the execution of his search warrant on August 11, 2009. He was initially charged in Magistrates' Court on or about March 31, 2010, and discharged on the same date. On or about May 11, 2010, he appeared in Court to seek a modification of the terms of his conditional discharge. The Police Inspector who led the search of his residence attended Court on both occasions. On the date of the second Court appearance, the Applicant posted the offending remarks about the Police Inspector on his Facebook page.

4. At the directions hearing before this Court, the following two issues were defined as requiring determination:

> "(a) whether section 214(1) of the Criminal Code Act 1907 ('the Code') taken in its statutory context on its face contravenes section 9 of the Constitution; and
>
> (b) whether the application of section 214(1) of the Code taken in its statutory context to the Applicant on the facts of the present case contravene his rights under section 9 of the Constitution."

5. It was also directed that the second issue would be dealt with on the basis of the Crown's Witness Statements or an Agreed Statement of Facts. In the event, only Witness Statements were filed and the Respondent conceded that the application of section 214(1) to the Applicant would interfere with his section 9(1) rights while the Attorney-General took no firm position as regards this point, ultimately leaving this issue with the Court. The effect of the Respondent's concession is that I am able to analyse the important legal issues raised by the present application on a principled basis with a mind uncluttered by any human considerations about the implications of the decision for the Applicant personally. Because the Attorney General has not formally conceded the unconstitutionality of the decision to prosecute the Applicant on the facts of the present case, in my judgment it would be inappropriate to simply grant an order in terms without ensuring that there is a reasoned basis for so doing.

6. The present application was listed for hearing in open Court and written submissions were duly filed. In the event, all counsel agreed that an oral hearing was not required and requested the Court to render a decision based on the written submissions alone. As the

second of the two issues is conceded by the Respondent and not positively challenged by the Attorney-General, it is to that issue that I will first turn. I will deal with the full merits of the point both in an attempt to provide some guidance for future cases and so as to ensure that it cannot be suggested that the Applicant as a member of the Bar has been "let off" for reasons unrelated to the merits of his case.

Does the application of section 214(1) of the Criminal Code to the Applicant on the facts of the present case interfere with his section 9 (1) of the Constitution rights?

The fundamental right protected by section 9(1)

7. Section 9 of the Bermuda Constitution provides as follows:

> ***"Protection of freedom of expression***
>
> *9 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*
>
> *(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*
>
> *(a) that is reasonably required—*
>
> *(i) in the interests of defence, public safety, public order, public morality or public health; or*
>
> *(ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or*
>
> *(b) that imposes restrictions upon public officers or teachers,*
>
> *except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*
>
> *(3) For the purposes of paragraph (b) of subsection (2) of this section in so far as that paragraph relates to public officers, 'law' in that subsection includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government.*"

8. Section 9(1), in very broad terms, proclaims and protects "*freedom of expression*", which is non-exhaustively defined as including "*freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence*". Section 9(2) then proceeds to demarcate the extent to which this fundamental right may be lawfully restricted by anything either (a) contained in any law, or (b) done under the authority of any law. It is the latter form of restriction, the effect of the application of the provisions of section 214(1), which is of present concern. However, irrespective of what form of restriction of freedom of expression is in issue, the law on its face or the law in action, the restriction can only validly interfere with the fundamental rights protected by subsection (1) of section 9 if the law is reasonably required for one of the section 9(2) purposes. Even if the interference is "*reasonably required*" for a qualifying purpose, the interference with freedom of expression may still be impermissible if it is "*shown not to be reasonably justifiable in a democratic society*".

9. This Bermudian constitutional provision, which is substantially similar to equivalent enactments in other Commonwealth constitutionally entrenched bills of rights, may be seen to be essentially derived from Article 10 of the ECHR:

> "***Article 10***
>
> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2.The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*"

10. The ECHR requires any legal restriction of freedom of expression to be "*necessary in a democratic society*" in the interests of the specified countervailing interests. The Bermuda Constitution imposes what appears to be a local or national primary standard for the state to meet (is the legal restriction reasonably required?). However, that presumably local or national standard of what is reasonably required for section (2) purposes is ultimately subject to what appears to be a secondary international standard of being reasonably justifiable in a democratic society.

11. It is also important not to forget that Bermuda's fundamental rights and freedoms provisions are also influenced by the International Covenant on Civil and Political Rights 1966[4], article 19 of which provides as follows:

> "***Article 19***
>
> *1. Everyone shall have the right to hold opinions without interference.*
>
> *2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
>
> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others;*
>
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals."*

The burden of proof

12. It seems clear to me from the scheme of section 9 and similar fundamental rights and freedoms sections where restrictions of the rights may be legally prescribed in the interests of broadly similar countervailing public interests[5], that the Crown bear the burden of establishing that a *prima facie* interference with the Applicant's section 9(1) is "*reasonably required*" for one of the purposes prescribed by section 9(2). A more restrictive approach to the onus of proof was adopted by Sir James Astwood C.J. in *The Royal Gazette et al-v- Attorney-General and The Commissioner of Police*, Supreme Court, Civil Jurisdiction 1982: 177, Judgment dated August 27, 1982. In that case, where the burden of proof point does not appear to have been fully argued, it was held that a constitutional applicant had to make out a *prima facie* case that (a) his section 9(1) rights had been infringed, (b) that the interference complained of was not reasonably required in one of the specified interests, and (c) that any reasonably required interference was not reasonably justifiable in a democratic society. However Sir James Astwood clearly took a

[4] Ratified by the United Kingdom and extended to Bermuda on May 20, 1976: http://www.dca.gov.uk/peoplesrights/human-rights/int-human-rights.htm#1.

[5] Sections 7 (privacy of the home and other property), section 8 (freedom of conscience), section 10 (freedom of assembly and association), section 11 (freedom of movement) and section 13(deprivation of property).

robustly pro-freedom of the press approach which did not require the applicants to meet a high threshold in terms of making out a *prima facie* case.

13. The more pro-applicant approach to the burden of proof contended for here, again without the benefit of full argument on the point, has been implicitly followed in at least one subsequent application for relief under section 15 of the Constitution and is also now supported by modern Privy Council authority. In a case concerning section 8 and freedom of conscience, *Attride-Stirling-v- Attorney General* [1995] Bda LR 6; [1995] 1 LRC 234, it was essentially common ground that once an interference with the fundamental right protected by subsection (1) was established, it was for the Crown to show that the interference fell within a permitted (local or national) public interest exception. In the present case therefore, it being equally admitted that the prosecution of the Applicant for criminal libel *prima facie* interferes with his freedom of expression rights, the question is whether the evidence relied upon by the Respondent demonstrates that the interference is "*reasonably required*" within section 9(2). In any event, in a recent case upon which Mr. Attridge for the Applicant relied, the Judicial Committee of the Privy Council regarded it to be uncontroversial that it was for the respondent to show that any *prima facie* interference with an applicant's freedom of expression rights was reasonably required and, if such requirement was made out, it was for the applicant to show that the interference was not reasonably justified in a democratic society. In *Worme-v-Commissioner of Police* [2004] UKPC 8, the Judicial Committee stated:

> "41.*It is, as already explained, common ground that the crime of intentional libel constitutes a hindrance to citizens' enjoyment of their freedom of expression under section 10(1) of the Constitution. It is therefore necessary for the respondent to show that the provisions of the Code are reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons. If that is established, then the burden shifts to the appellants to show, in terms of the last limb of section 10(2), that the provisions are not reasonably justifiable in a democratic society. See Cable and Wireless (Dominica) v Marpin Telecoms and Broadcasting Co Ltd [2001] 1 WLR 1123, 1132 per Lord Cooke of Thorndon.*"

Constitutional approach to construing "existing laws"

14. Before considering the evidence and section 214(1), it is necessary to appreciate the distinctive approach to construing a law enacted prior to the Constitution as opposed to a law enacted post-Constitution. This distinction is not unique to the Bermuda Constitution

and appears in other Bills of Rights contained in 'Westminster-style' constitutions[6]. Section 5 of the Bermuda Constitution Order provides as follows:

> "***Existing laws***
> *5 (1) Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day* [2 June 1968] *as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*"

15. This provision was explained and applied by the Court of Appeal for Bermuda in *Attride-Stirling-v- Attorney General* [1995] Bda LR 6 (where it was held that both the law on its face and its application to the appellant unlawfully infringed his fundamental rights) as follows[7]:

> "*The Defence Act 1965 came into force before the establishment of The Bermuda Constitution. Accordingly it now takes effect*
>
> > *'as if [it] had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.' (Section 5(1) of the Bermuda Constitution Order 1968)*
>
> *How that is achieved is exemplified by Attorney General of St. Christopher, Nevis and Anguilla v. Reynolds 1979 3 All E.R. 129. We are satisfied that we should not, as we are asked to do, declare the provisions of section 27 (and more particularly sub-section (4)) to be void, for they are unobjectionable in so far as they relate to conscientious objectors who seek exemption from combatant duties only. We think it enough that we should declare that Part II of the Act should be read as excepting from reporting under section 17(2) any persons who can show that they conscientiously object to serving in a military organization. We declare accordingly and make no further order.*"

16. As section 5(2) of the Constitution Order gave the Governor 12 months to amend any existing laws to bring them into conformity with the Constitution, the presumption of

[6] Under many Caribbean constitutions however, it appears that existing laws are granted blanket immunity from challenge. This appears to be the position in The Bahamas, Barbados, Jamaica and Trinidad and Tobago.
[7] Judgment, pages 5-6.

constitutionality would now seem to apply with equal force to existing laws and legislation enacted post-Constitution.

The defamatory statements complained of the evidence in support of the charge

17. The Applicant was charged under section 214 (1) of the Criminal Code upon an Information which alleged as follows:

> "*1. On the 11th day of May 2010, in the Islands of Bermuda, did unlawfully publish defamatory matter concerning Police Inspector* [C]*, to wit: 'This Detective Inspector really has it in for me! Why on earth* [C] *has taken an unhealthy interest in me is astonishing...I really hope it ain't because I'm good at what I do and I'm black...that would make him vindictive and racist...could it be?*"

18. The Respondent's Witness Statements shed light on the form which the "publication" complained of took. The Applicant published the statements on his Facebook page the security settings of which were such that only his friends could read them. A Detective Sergeant who could not read the statements called a Police Constable who was one of the Applicant's Facebook friends at around 4.30 pm and asked her to access the comments and to forward them to him. The Detective Sergeant upon receipt forwarded the Applicant's comments and related comments from the Applicant's Facebook friends on to the Police Inspector. The Applicant was clearly charged with the offence in question in relation to statements which involved his imparting ideas and opinions by means of a modern electronic form of correspondence. The laying of a criminal charge, in and of itself, unarguably interfered with his section 9(1) rights. For a practising lawyer to be charged with a criminal offence for expressing opinions about the motivation of the Police in charging him with another minor criminal offence for which he had been discharged by a Court must constitute one of the more dramatic forms that public interference with section 9(1) rights could potentially take in a democratic society. But equally, the officer cast as the villain of the piece might retort, it is difficult to imagine a practising lawyer expressing in writing (otherwise than in support of a client's cause) more pejorative remarks about a senior police officer.

19. Be that as it may, the crucial question is whether (the Respondent having conceded this point and the Attorney-General adopting an essentially neutral position), the material before the Court establishes any reasonable requirement which justifies the *prima facie* interference with his section 9(1) rights which the Applicant has made out. The Respondent filed two Witness Statements. One essentially exhibited the Facebook extracts containing the offending remarks and comments (at least one of which was far more offensive than the Applicant's); the other was the Police Inspector's largely subjective account of how the original statement and the related comments distressed him. Most significantly however, he stated that his employers saw fit to carry out a security assessment on his behalf. These steps were quite clearly prompted by one of the

responses to the Applicant's remarks, not his remarks themselves; however, the Police Inspector quite fairly took the view that the threatening comments were instigated by the original remarks, coming as they did from a person with "*many 'Facebook' fans*". Section 9(2), it bears repeating, provides in salient part as follows:

> "*(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*
>
> *(a) that is reasonably required—*
>
> *(i) in the interests of defence, public safety, public order, public morality or public health; or*
>
> *(ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or*
>
> *(b) that imposes restrictions upon public officers or teachers,*
>
> *except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."*

20. In my judgment, only section 9(2)(a) is engaged by the facts of the present case. Paragraph (b) of section 9(2) is clearly designed to permit restrictions to be placed on the freedom of expression rights of public officers and teachers. The evidence relied upon by the Respondent in support of the criminal libel charge did not come close to suggesting that the Applicant's "rant" needed to be criminally sanctioned in the interests of "*defence, public safety, public order, public morality or public health*" within section 9(2)(a)(i). The Police Inspector's Witness Statement speaks substantially about the damage to his personal reputation and his concerns about his personal safety (including that of his family). It is a notorious fact that charismatic figures can through provocative statements incite acts of violence and even genocide, which is why prominent individuals in the modern era of mass communication have a moral duty to exercise considerable care when writing or talking about emotive topics such as race. It is also true that social networks such as Facebook provide a vehicle for what may represent mass

communication under the guise of private correspondence amongst 'friends'. However, nothing in the Respondent's own evidence or the Applicant's own Facebook remarks about the Inspector come even close to supporting a finding that laying an information for criminal defamation was "reasonably required" in any of the interests listed in section 9(2)(a)(i) of the Bermuda Constitution.

21. While one of the Applicant's Facebook friends responded in a way that caused the Inspector himself to subjectively fear for his safety, it is impossible to objectively view those exceptional comments as giving rise to any threat to "*public*" safety, let alone any threat that would justify prosecuting the Applicant in respect of his own sarcastically offensive remarks. The overwhelming majority of responses to the Applicant's remarks were inoffensive and registered positive support for the Applicant and came from females. The comment that the Inspector was understandably most troubled by was the one which said: "*He is racist. Met up with him a few years ago…Needs to get his a** outta Bermuda…b*st*rd*". However, looked at objectively from a distance, this comment by a female Facebook friend of the Applicant did not go so far as to suggest that the Inspector should be forcibly removed from Bermuda, let alone imply that he should be attacked. Nor did she launch a wholesale attack on police officers generally. But the crucial point is, as Mr. Attridge rightly submitted, that this disproportionate response to the Applicant's own comparatively innocuous initial posting by a third party cannot logically justify charging the Applicant himself in respect of his own remarks.

22. It is easy to envisage circumstances in which social networks such as Facebook might be used in a manner which would give rise to real threats to the interests of "*defence, public safety, public order, public morality or public health*". However, the present case simply does not fit this bill.

23. That leaves section 9(2)(a)(ii) to consider. Laws may make reasonable requirements interfering with section 9(1) rights:

> "*(ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments…"*[emphasis added]

24. The underlined text in section 9(2)(a)(ii) is the only element of the sub-paragraph which appears to me to be potentially relevant to the present case. This embraces the law of defamation. The remainder of the sub-paragraph is concerned with *in camera* hearings, the law relating to confidentiality, contempt of court, and laws restricting the content of various forms of public communication (including, very arguably, internet-based social networks). The latter form of restriction of free speech, the regulation of various forms of the media, is likely to be the primary domain in which abuse of free speech through the internet is worked out. Save in parts of the world which do not recognise freedom of

expression as it is conceived in the Americas and Western Europe, the State is unlikely to use the criminal law to regulate abuse of internet free speech by ordinary citizens using websites established and maintained by institutional internet communications entities, save in very exceptional cases. Because of the global nature of the internet as well as its comparative novelty, the development of appropriate regulatory rules is likely to take time and to be problematic, as the notorious recent "wikileaks" disclosures illustrate.

25. I find, therefore, that the only potential reasonable legal requirement which the Respondent could rely upon for prosecuting the Applicant in relation to the exercise of his section 9(1) rights is the law relating to defamation itself. In practical terms, the most uncontroversial application of this constitutionally permitted derogation from the freedom of expression rights guaranteed by section 9(1) is the civil law of defamation. Ordinary citizens clearly have the right to sue for damages in respect of defamatory statements, with the success of such actions dependent in part upon whether absolute or qualified privilege may be raised as a valid defence. If the Applicant had been sued for defamation, it would not be open to him to complain that the mere filing of a civil suit interfered with his section 9(1) freedom of expression rights. Why then has the Respondent conceded that the mere application of the criminal law of defamation to the Applicant's case impermissibly interferes with his constitutional rights, while disputing that section 214(1) is inconsistent on its face with section 9(1) of the Constitution?

26. The reasons for the concession are not explicitly spelt out in the 'Submissions for the Crown'. However, they can be extrapolated from the arguments advanced in support of the constitutional validity of a criminal sanction for defamation such as that contained in section 214 of the Criminal Code. Ms. Clarke acknowledges that the criminal law of defamation can only be sparingly used in particularly egregious cases, citing J.R. Spencer's article[8] in which the author observes that:

> "*That such cases are rare is surely no objection to the creation of an appropriate offence. These cases are extraordinary, it is true, but they are also extraordinarily bad…..There is no reason why it should not be a crime, unless making it into one unreasonably hampers people in freely communicating with one another, or unreasonably interferes with newspapers in their job of disseminating news and views…*"

27. The present libel is obviously nowhere near "extraordinarily bad"; after all, it is not even alleged that the Applicant is guilty of intentionally defaming the Inspector. Mr. Attridge in his submissions aptly referred, by way of analogy, to *The Royal Gazette et al-v-Attorney-General and The Commissioner of Police*, Supreme Court, Civil Jurisdiction 1982: 177, Judgment dated August 27, 1982 where an allegation of intentional defamation contrary to section 214(2) of the Criminal Code was held not to be reasonably required so as to justify this Court granting leave to prosecute the local daily newspaper[9][10] in relation to such charge. The defamation which gave rise to the

[8] '*Criminal Libel: the Law Commission's Working Paper*' [1983] Crim LR 524-529 at 528.
[9] Judgment, pages 21-23.

extraordinary decision of the prosecution authorities to seek leave to prosecute the Royal Gazette, the editor and one journalist and to issue and execute search warrants on the newspaper's premises took the following form. The Royal Gazette published an article about disciplinary proceedings under a bold headline on May 7, 1982: "*Lawyer Julian Hall is now disbarred.*" The Bermuda Bar Act 1974 expressly provided that the relevant disciplinary punishment did not take effect until the appeal period had expired and/or appeal rights exhausted. The story was published before the disbarment legally took effect. It is a matter of record that the disbarment was set aside by the Court of Appeal for Bermuda[11]. The integrity of the confidentiality provisions of the Bermuda Bar Act was a public interest rationale for the commencement of criminal libel proceedings; but this rationale did not obviously fall into any of the permitted grounds for restricting freedom of expression as set out in section 9(2)(a) (i) and (ii).

28. Sir James Astwood's crucial findings on this issue (at pages 22-23) were as follows:

> "*The application of the Criminal Code to this particular case would seem to offend against section 9 of the Constitution...*
>
> *The Applicants have discharged their burden of proof to my satisfaction. In my view they have been hindered in their freedom of expression. I do not accept the argument of the Attorney General that the Applicants have enjoyed their freedom of expression to libel anyone they choose and that they are only now called on to account. This argument does not seem sound to me. The Applicants are held in terrorem. They are now threatened that if they publish something which the Attorney General does not agree with, and which may or may not be true, he will seek leave to prosecute. This cannot be proper; nor can it be justified in a democratic society, nor can it be justified on the facts of the case before me....*
>
> *...I do not have sufficient facts before me to say that a prosecution was reasonably justified on the grounds of public order or otherwise. It seems to me, on the facts presented to me, that if Mr. Hall has a complaint against the Applicants he should pursue it in the civil courts. I see no reason why the State should use its resources to prosecute. No issues of a very serious nature have been raised even if the publication...were not true. A matter of a serious nature would be a matter which threatens the peace or which brings the Government, business or administration of justice into serious disrepute, and something which affects the whole community or sizable section of it. I do not see these elements present in the facts presented to me...*
>
> *The facts disclosed to me in this application are not sufficient for me to say that it was necessary for the State to put a hindrance in the way of the Applicants in the enjoyment of their freedom of expression...The facts*

[10] This leave requirement is applicable to charging the press but not applicable to prosecuting individuals.
[11] *Hall-v-Bermuda Bar Council*, Court of Appeal for Bermuda, Civil Appeal 1982: 13, Reasons for Judgment dated March 30, 1983.

presented to me are insufficient to take away the Applicants' freedom of expression by a prosecution based on these facts..."

29. At the core of Astwood CJ's analysis was the proposition that a criminal defamation prosecution for intentional defamation would only be constitutionally permissible where some compelling public interest (over and above reputational interests of the individual defamed) was relied upon. He reached this conclusion with reference to English case law concerning how the discretion to prosecute was exercised under the United Kingdom Libel Act 1843 upon which Part XII of the Criminal Code was based. I adopt this approach as reflecting a juristically sound approach to section 9 of the Constitution and the circumstances in which the criminal law may permissibly be deployed to punish defamation of an individual's character. It follows that this analysis carried out in relation to a prominent front page story in Bermuda's only daily newspaper which involved a breach of the confidentiality provisions of the Bermuda Bar Act 1974 applies with even greater force to:

    (a) private (or semi-private) correspondence between Facebook friends which was not published to the world at large;

    (b) defamatory statements in the form of an innuendo which are made in circumstances where the author of the statements is not even alleged to have known the statements to be untrue;

    (c) self-serving statements made by a partisan person with an axe to grind against a police officer, as opposed to statements which were made by an apparently independent and unbiased commentator;

    (d) statements which are merely alleged to have caused private injury as opposed to public harm.

30. Ms. Rogers QC in her Amicus brief helpfully referred the Court to the European Court of Human Rights approach of not prohibiting criminal defamation offences altogether but rather restricting the discretion to prosecute to exceptional circumstances, citing various cases including *Raichinov-v-Bulgaria* (2008) 46 EHRR 28. The applicant in the *Raichinov* case, was responsible for allocating the judicial budget. At a meeting of the Supreme Judicial Council, "the applicant said: 'You have decided to have financial matters dealt with by Mr S. For me he is not a clean person...' He then added: 'I can prove this'" (paragraph 10). The applicant was charged with degrading Mr. S's dignity, convicted and fined. The criminal court found that the offence was "intentional", heard by Mr. S himself and around 25 people, but took into account that the fact the applicant had apologised during the meeting and that the remarks had not been published to the public at large (paragraph 17). The Court's analysis and conclusions on whether the application of the criminal law to the applicant in the *Raichinov* case was legally justified warrant reproduction in full because of their persuasive force:

"*43. It was not disputed that the applicant's conviction and sentence by the national courts following his remark about the deputy Prosecutor-General amounted to an interference with his right to freedom of expression. Such interference will be in breach of Article 10 if it does not meet the requirements of paragraph 2 thereof. It should therefore be determined whether it was prescribed by law, pursued one or more of the legitimate aims set out in that paragraph and was necessary in a democratic society in order to achieve those aims.*

44. The interference was undoubtedly prescribed by law, namely by Articles 148 and 146 § 1 of the Criminal Code. It also appears that the law was formulated with sufficient precision (see the admissibility decision in the present case; Tammer v. Estonia, no. 41205/98, § 38, ECHR 2001-I; and, mutatis mutandis, Öztürk v. Turkey [GC], no. 22479/93, §§ 54-57, ECHR 1999-VI).

45. The Court further accepts that the interference pursued the legitimate aim of protecting Mr S.'s reputation. However, in view of the facts that the applicant's remark was uttered at a meeting of an administrative body held behind closed doors and that no form of publicity was involved, the Court is not persuaded that it also served to maintain the authority and impartiality of the judiciary.

46. It remains to be established whether the interference was necessary in a democratic society.

47. On this point, the Court starts by reiterating the relevant principles which emerge from its judgments:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks

held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see Janowski v. Poland [GC], no. 25716/94, § 30, ECHR 1999-I, with further references).

48. Turning to the facts of the present case, the Court notes that the victim of the insult was a high-ranking official, the deputy Prosecutor-General, who also dealt with budgetary matters in the judicial system. Therefore, while not limitless, the bounds of acceptable criticism geared toward him were wider than in relation to a private individual. It is true that he did not lay himself open to public scrutiny and needed to enjoy confidence in conditions free of undue perturbation when on duty (see Janowski, cited above, § 33; and, mutatis mutandis, Steur v. the Netherlands, no. 39657/98, §§ 40 and 41, ECHR 2003-XI). However, the need to ensure that civil servants enjoy public confidence in such conditions can justify an interference with the freedom of expression only where there is a real threat in this respect. The applicant's remark obviously did not pose such a threat and did not hinder Mr S. in the performance of his official duties (see, mutatis mutandis, Yankov v. Bulgaria, no. 39084/97, § 142, ECHR 2003-XII). In this connection, it should also be borne in mind that, unlike the situation obtaining in Janowski, where two municipal guards had been insulted in the street, while performing their policing duties, in front of numerous bystanders (see Janowski, cited above, §§ 8 and 34), the applicant's remark was made in front of a limited audience, at a meeting held behind closed doors. Thus, no press or other form of publicity was involved (see, mutatis mutandis, Nikula v. Finland, no. 31611/96, § 52 in limine, ECHR 2002-II; Yankov, cited above, §§ 139 and 141; and, as an example to the contrary, Pedersen and Baadsgaard v. Denmark [GC], no. 49017/99, § 79, ECHR 2004-XI). The negative impact, if any, of the applicant's words on Mr S.'s reputation was therefore quite limited.

49. Moreover, in view of the applicant's previous professional interactions with Mr S. (see paragraph 8 above), his opinion about the latter, expressed at a meeting at which the Supreme Judicial Council was dealing with budgetary issues, could be considered as forming, to a certain extent, part of a debate on a matter of general concern, which calls for enhanced protection under Article 10. It should also be noted that the applicant apparently uttered the remark formed on the basis of material which he offered to produce in corroboration (see paragraph 10 above).

50. Another factor on which the Court places particular reliance is that the applicant was not subjected to a civil or disciplinary sanction, but instead to a criminal one (see, as examples to the contrary, P. v. the United Kingdom, no. 11456/85, Commission decision of 13 March 1986, Decisions and Reports 46, p. 222; Meister v. Germany, no. 30549/96, Commission decision of 10 April 1997, unreported; Fuentes Bobo, cited above; De Diego Nafría, cited above; Vides Aizsardzības Klubs

v. Latvia, no. 57829/00, 27 May 2004; and Steel and Morris v. the United Kingdom, no. 68416/01, ECHR 2005-...). It is true that the possibility of recurring to criminal proceedings in order to protect a person's reputation or pursue another legitimate aim under paragraph 2 of Article 10 cannot be seen as automatically contravening that provision, as in certain grave cases – for instance in the case of speech inciting to violence – that may prove to be a proportionate response. However, the assessment of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies (see Lehideux and Isorni v. France, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, p. 2886, § 51 in fine and p. 2887, § 57; and, mutatis mutandis, Cumpănă and Mazăre v. Romania [GC], no. 33348/96, § 115, ECHR 2004-XI). The Court further notes that the criminal proceedings against the applicant were instituted on the insistence of Mr S.'s superior, the Prosecutor-General, who reacted on the spot, characterising the applicant's remark as a "crime" immediately after it had been uttered, and shortly after that instructing the Sofia City Prosecutor's Office to open a preliminary inquiry against the applicant (see paragraphs 10 and 11 above). Mr S. did not participate as a party to them and did not make a claim for non-pecuniary damages against the applicant, as he could have done (see paragraphs 30 and 31 above; and also Fuentes Bobo, cited above, § 48 in fine). In this connection, the Court notes that later the relevant provisions of the Bulgarian Criminal Code were amended and at present provide that insult is privately prosecutable in all cases without exception (see paragraph 30 above and, mutatis mutandis, Cumpănă and Mazăre, cited above, § 115 in fine).

51. It should also be observed that the applicant's remark, while liable to be construed as a serious moral reproach, was apparently made in the course of an oral exchange and not in writing, after careful consideration (see Fuentes Bobo v. Spain, no. 39293/98, § 48, 29 February 2000; and, as an example to the contrary, De Diego Nafría v. Spain, no. 46833/99, § 41, 14 March 2002). Against this background, the reaction of the Prosecutor-General – who was Mr S.'s hierarchical superior –, the resulting criminal proceedings against the applicant, and his conviction seem as a disproportionate response to the incident in issue. In this connection, the Court reiterates that the dominant position which those in power occupy makes it necessary for them to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified criticisms of their adversaries (see, mutatis mutandis, Castells v. Spain, judgment of 23 April 1992, Series A no. 236, pp. 23-24, § 46; and Ceylan v. Turkey [GC], no. 23556/94, § 34, ECHR 1999-IV). The applicant's resulting sentence – a fine and a public reprimand –, while being in the lower range of the possible penalties, was still a sentence under criminal law, registered in the applicant's criminal record (see Scharsach and News Verlagsgesellschaft v. Austria, no. 39394/98, § 32, ECHR 2003-XI).

52. On the basis of the foregoing considerations the Court concludes that no sufficient reasons have been shown to exist for the interference in question. The restriction on the applicant's right to freedom of expression therefore fails to answer

any pressing social need (see Steur, cited above, § 45) and could not be considered necessary in a democratic society.

53. There has therefore been a violation of Article 10 of the Convention."

31. This decision is highly persuasive for two important reasons. Firstly because section 9 of the Bermuda Constitution is substantially derived from Article 10 ECHR; the approach of the European Court of Human Rights is in substance indistinguishable from the approach adopted by this Court (Sir James Astwood, CJ) in *The Royal Gazette Ltd.* case in 1982. Secondly, the factual context is instructive in that (a) in both *Raichinov* and the present case, the publication was made to a select group of persons rather than the public at large, (b) in both cases the defamation criticised a public officer's professional conduct and implied unfitness for office, however (c) in Raichinov, by way of contrast to the present case, the defamatory allegation was said by the prosecution to be intentional and was asserted by way of fact; in the present case no intention to defame was alleged and all that was asserted was an opinion. In a case that was in many ways similar but also more serious than the present case, the European Court of Human Rights found that deploying the criminal defamation law against the applicant impermissibly interfered with his freedom of expression rights. In reaching this conclusion, the following points of legal principle were made (paragraph 47):

(a) "*Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society' ";*

(b) "*As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly*";

(c) "*The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'";*

(d) "*In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'*";

(e) "*It is true that he did not lay himself open to public scrutiny and needed to enjoy confidence in conditions free of undue perturbation when on duty (see*

Janowski, cited above, § 33; and, mutatis mutandis, Steur v. the Netherlands, no. 39657/98, §§ 40 and 41, ECHR 2003-XI). However, the need to ensure that civil servants enjoy public confidence in such conditions can justify an interference with the freedom of expression only where there is a real threat in this respect. The applicant's remark obviously did not pose such a threat and did not hinder Mr S. in the performance of his official duties";

(f) "*It is true that the possibility of recurring to criminal proceedings in order to protect a person's reputation or pursue another legitimate aim under paragraph 2 of Article 10 cannot be seen as automatically contravening that provision, as in certain grave cases – for instance in the case of speech inciting to violence – that may prove to be a proportionate response. However, the assessment of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies...*"

32. The first broad proposition as to the importance of freedom of expression hardly needs any analysis to readily accept. The right is characterised as fundamental in section 9 of the Bermuda Constitution and article 10 ECHR. Moreover, the statements of principle made in merely persuasive decisions of the European Court of Human Rights are indistinguishable from similar statements made by the Judicial Committee of the Privy Council in several cases construing constitutional provisions even more similar to our own section 9 than article 10 is. Such decisions are binding on the Bermudian courts. For instance, in *Worme-v- Commissioner of Police* [2004] UKPC 8, upon which the Applicant's counsel relied, Lord Rodger(delivering the judgment of the Board) opined as follows:

> "*19. In considering in more detail the arguments advanced by counsel for both parties in their helpful submissions, their Lordships bear in mind the importance that is attached to the right of freedom of expression, particularly in relation to public and political matters, guaranteed by section 10 of the Constitution. The spirit of the statement of the European Court of Human Rights in Lingens v Austria (1986) 8 EHRR 407, 418-419, at para 42, that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention" has been reflected in decisions of courts throughout the world. In Hector v Attorney General of Antigua [1990] 2 AC 312, 318, for instance, Lord Bridge of Harwich said:*
>
> > *'In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such*

criticism amounts to political censorship of the most insidious and objectionable kind.""

33. Secondly, the criminal complainant in the present case was a senior police officer whom, while not as senior a public officer as the complainant in *Raichinov,* may be presumed to enjoy a measure of security of tenure so that the defamatory remarks are unlikely to impact adversely on his ability to perform his public duties. It is, surely, an occupational hazard of being a police officer or a judge that one's official actions will on occasion generate critical comment of a pejorative nature, both from persons adversely affected by such actions and (when the matters concerned are in the public domain) members of the wider public. This leads on to the third point.

34. Thirdly, and pivotally, I accept the European Court of Human Rights' holding that "*the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'*". The Applicant's impugned remarks were made in the private context of informal communication and, from its timing, was clearly an impromptu emotional response to what must have been an extremely uncomfortable experience (for a criminal defence lawyer) of appearing in court as a criminal defendant. The Applicant merely asked the rhetorical question of whether racism on the part of the Police Inspector had prompted the search of the Applicant's home and the decision to charge him with possessing a small amount of cannabis, based on the positive assertion that the Inspector really "had it in for" the Applicant.

35. Although a more appropriate question might, perhaps, not have focussed on the Police Inspector at all but rather on the broader policy implications of how the discretion to prosecute is exercised in relation to such offences, the Applicant's comments also tapped into a wider longstanding public policy debate. Against a history of slavery and segregation and widely canvassed public concerns about the over-representation of African-Bermudian males in the criminal justice system, the impugned comments might be viewed as somewhat inelegantly inviting debate on whether the Applicant's racial profile may have influenced the decision to prosecute him. The operative decision to exercise the discretion to prosecute was made by the Director of Public Prosecutions, not the Police Inspector. But even if the Applicant's comments were unfair (as they appear to me to be) and the innuendo about the Inspector wholly wrong (as it appears based on the evidence before me to be), it is difficult to see how this would justify the first criminal defamation charge in Bermuda for almost 30 years. In the Skeleton Submissions of the Attorney General's Chambers, it is submitted that the crucial issue is "*whether there has been a real threat to the Detective Inspector's reputation by the alleged defamatory material*" (paragraph 9). Merely establishing such a threat cannot suffice to justify criminal defamation proceedings within the reasonable requirements of section 9(2) of the Constitution. Indeed, as the European Court of Human Rights has pointed out in *Gavrilovici-v-Moldova*, Application 25264/05, the mere use of insulting terms which are often matters of opinion rather than assertions of fact are not necessarily defamatory:

> "*56. The Court also considers that, even assuming that the applicant called I.M. a 'fascist', the domestic courts failed to address the crucial issue of whether the utterance attributed to him was capable of being a value judgment, the veracity of which, unlike a statement of fact, is not susceptible of proof. It recalls that it has previously found that terms such as 'neo-fascist', and 'Nazi' do not automatically justify a conviction for defamation on the ground of the special stigma attached to them (see Scharsach and News Verlagsgesellschaft v. Austria, no. 39394/98, § 43, ECHR 2003-XI**).** In Bodrožić v. Serbia (no. 32550/05, § 51, 23 June 2007), the Court repeated its view that the generally offensive expressions 'idiot' and 'fascist' may be considered to be acceptable criticism in certain circumstances (see Bodrožić, cited above; Oberschlick v. Austria (no. 2), judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV; Feldek v. Slovakia, no. 29032/95, ECHR 2001-VIII). It further observed in the Bodrožić case that calling someone a fascist, a Nazi or a communist cannot in itself be identified with a factual statement of that person's party affiliation (see, mutatis mutandis, Feldek v. Slovakia, cited above, § 86).*"

36. Bearing in mind the fact that the Applicant was simply writing to his Facebook friends expressing a personal gripe, it is difficult to see what public harm was caused by his remarks (as hurtful as they no doubt were to the Police Inspector personally) which would justify deploying the criminal law to sanction the exercise of the Applicant's section 9(1) rights. Putting aside technical legal analysis and looking at the circumstances of the offending remarks made the Applicant in a simple and practical way the position may be viewed as follows. The Applicant was hurt and upset at having to appear in the Magistrates' Court as a criminal defendant and felt that his original charge must have been influenced by ill-will towards him. After returning from Court he gave vent to his sense of victimisation in the hope that his Facebook friends would furnish him with moral support. This support his Facebook friends duly (and very promptly) provided.

37. Finally a unique but significant feature of this case which was not addressed in argument is the potential character of Facebook messages as "correspondence" for section 9(1) purposes. Section 9(1) explicitly guarantees (as one of two sub-categories of freedom of expression) freedom from interference with one's correspondence as well as the freedom to impart and receive ideas. The way in which the Police admittedly obtained access to the impugned message (by requesting one the Applicant's friends who happened to be a Police Officer to supply a copy to the Inspector) is not wholly indistinguishable from intercepting mail (electronic or otherwise). Any form of interference with private correspondence ought not to take place in a legal and policy vacuum. If appropriate guidelines do not already exist (they may well do), it is to be hoped that they will be developed with some expedition. It is easy to imagine circumstances in which public order and/or safety will require such interference with communication to lawfully take place in the course of investigating serious criminal conduct such as gang-related violence, drugs trafficking, money laundering and international terrorism.

38. However, in most cases where serious injury is caused to personal reputations, civil remedies alone will be a proportionate response. Where public officers are concerned, the

Crown in appropriate cases would always be able to signify its support for the defamed officer by funding a defamation suit. It must also be remembered that many Bermudians, no doubt like people everywhere, like to "run their mouths" or, in the case of letters to the editor, "run their pens". It is easy to imagine that several people (especially holders of public officers) are defamed every minute of every day. This is what freedom of expression in a democratic society is all about. Much defamation causes no real injury, and is best ignored. Even civil defamation proceedings are only resorted to in exceptional cases of serious libels (very rarely in cases of slander).

39. No attempt to justify the decision to prosecute the Applicant for the offence non-intentional criminal defamation, with reference to the provisions of section 9(2), was advanced by way of evidence or submissions. Having regard to the legal principles established by this Court in *The Royal Gazette et al-v- Attorney-General and The Commissioner of Police*, albeit an unreported decision[12] of nearly 30 years vintage, combined with the fact that criminal defamation proceedings have not within recent memory[13] been successfully brought, the decision to prosecute the Applicant on the facts before this Court is somewhat surprising. It is even more surprising when reference is made to the European Court of Human Rights jurisprudence[14] on article 10 ECHR, upon which section 9 of the Bermuda Constitution is substantially based. The Respondent's decision to concede this limb of the Applicant's constitutional complaint was entirely understandable and legally justifiable.

Conclusion: was the laying of the section 214(1) of the Criminal Code charge against the Applicant an infringement of his rights under section 9(1) of the Constitution on the facts of the present case?

40. For the above reasons I find that the application of the criminal law of defamation to the Applicant on the facts of the present case infringed his freedom of expression rights under section 9(1) of the Constitution. The Applicant is entitled to a declaration accordingly.

[12] It is to be hoped that this landmark constitutional decision and the related Court of Appeal reasons in *Hall-v-Bermuda Bar Council* (an important case on bias) may yet be included in the Bermuda Law Reports so as to be accessible to generations of practitioners who have no personal recollection of these judgments.

[13] It is difficult to ascertain when the criminal defamation law was invoked before 1982. The most famous (and in today's terms bizarre) criminal defamation trial charged on indictment the Reverend Charles Monk, the African-American editor of an early 20th century anti-Establishment Bermudian newspaper, with offences relating to a newspaper story on the alleged persecution of Jamaican workers employed at the Royal Naval Dockyard. The accused was convicted by the jury at his trial in 1903, in the course of which his Black British counsel, Matthew Henry Spencer-Joseph, died of suspected poisoning. The editor was sentenced to four months imprisonment and fined £100 or six months in default: Ira Philip, '*Freedom Fighters From Monk to Mazumbo*'(Akira Press Ltd. : London, 1987), Chapter III.

[14] Notably *Raichinov-v-Bulgaria* (2008) 46 EHRR 28.

Does section 214(1) of the Criminal Code in its statutory context on its face contravene section 9 of the Constitution?

The relevant Criminal Code provisions

41. Section 214(1) can only be fully understood in the broader context of Part XII of the Criminal Code as a whole. Due to their length, the relevant provisions are reproduced in full in an Appendix to this Judgment.

42. The most significant provisions for an understanding of the terms and effect of section 314(1) are those which precede it in Part XII of the Criminal Code. Defamation is defined in a way that appears to the non-specialist eye to be broadly consistent with the civil law tort of defamation. Section 205 also defines publication in a way which appears broad enough to encompass publication in a cyberspace dominated world. Section 207 provides: "*It is unlawful to publish any defamatory matter unless such publication is protected, or justified, or excused, by law.*"

43. Absolute protection is afforded to reports of court proceedings and public enquiries (sections 208-209). Fair comment in good faith on such proceedings, and various other matters of public interest (including the conduct of judges, witnesses or public officers) is also protected (section 210). Section 211 delineates which matters are questions fact and which are questions of law. Publishing the truth is protected (section 212), while various lawful excuses are specified (section 213). Section 215 creates extortion-related offences. Section 216 provides a special defence where a person was not likely to be injured by defamation published otherwise than in writing, while section 217 provides a special defence for proprietors, publishers and editors of periodicals (lack of knowledge combined with an absence of negligence). Sections 218 and 219 provide protection for sellers of periodicals and employers. However, the accused person must prove the absence of knowledge for the purposes of sections 217-219 (section 220); on the other hand the party alleging a lack of good faith for the purposes of any section in Part XII must prove the absence of it (section 221). Finally, section 222 provides that no criminal prosecution for defamation may be commenced against any person responsible for a periodical without leave of a judge and a hearing at which the accused person has an opportunity to be heard.

44. Mr. Attridge criticised the preferential treatment afforded to newspaper periodicals by section 222. Interestingly, the Libel Act 1857 provides special civil defences to newspaper proprietors as well. Another oddity is section 212, which qualifies the defence of truth making the criminal defence more limited than the civil law defence of justification. Section 212 provides: "*It is lawful to publish defamatory matter if the matter is true, and if it is for the public benefit that the publication complained of should be made.*" At common law, the defence of justification merely requires the defendant to

prove that the defamatory statements complained of were substantially true[15]. It is possible that there are other anomalies in Part XII of the Criminal Code, but it suffices for the purposes of the present case merely to identify the two foregoing examples.

45. It remains to consider whether (a) the Applicant has established a *prima facie* case that section 214(1) contravenes his section 9(1) of the Constitution rights, and (b) (potentially more controversially) whether the Respondent has shown that section 214(1) of the Criminal Code is reasonably required within one of the justifying categories set out in section 9(2) of the Constitution.

The respective arguments of counsel

46. The Applicant's counsel adopts the entirety of the Amicus brief submitted by the Media Legal Defence Initiative ("MLDI"), which contends that section 214 as a whole should be found to be unconstitutional, but focuses on the sole issue which requires determination in the present application as defined at the directions stage. That is whether what Mr. Attridge submits is known as negligent defamation (as contrasted with intentional defamation) can validly be the subject of criminal sanctions without falling afoul of the protections contained in section 9 of the Constitution.

47. Counsel cited two cases. The first was a decision of the Judicial Committee of the Privy Council dealing with similar Grenadian constitutional provisions and establishing that criminal intentional defamation provisions were not unconstitutional: *Worme-v-Commissioner of Police for Grenada* [2004] 2 A.C. 430. It was submitted that non-intentional defamation was quite different. Since *Worme*, the United Kingdom had abolished criminal defamation altogether. However, Mr. Attridge pointed out:

> "*25. Perhaps the most glaring difference between the position as it once was in the UK and the Bermudian position is that in the UK when libel could be a crime it was subject to the overriding requirement that the libel had to be sufficiently serious so as to justify the invocation of the criminal law and the resources of the state...*"

48. The Applicant's counsel then proceeded to cite *The Royal Gazette et al-v- Attorney-General and The Commissioner of Police*, Supreme Court, Civil Jurisdiction 1982: 177, Judgment dated August 27, 1982, noting that an attempted prosecution for intentional defamation was held to be unconstitutional. It is then asserted by way of conclusion:

> "*We submit that the crime of negligent libel has no place in a modern democracy...*"

[15] See e.g. *Grobbelaar-v-News Group Newspapers* [2002] UKHL 40 at paragraph 4 (per Lord Bingham).

49. Mr. Attridge also placed the May 16, 2011 United Nations General Assembly '*Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*' [16] before the Court. The Report focuses on the importance of freedom of expression in the internet era and the limited circumstance in which States can permissibly interfere with such expression in compliance with article 19 of the International Covenant on Civil and Political Rights (ICCPR). The Report includes the following conclusions and recommendations:

> "*72. The Special Rapporteur remains concerned that legitimate online expression is being criminalized in contravention of States' international human rights obligations, whether it is through the application of existing criminal laws to online expression, or through the creation of new laws specifically designed to criminalize expression on the Internet. Such laws are often justified as being necessary to protect individuals' reputation, national security or to counter terrorism. However, in practice, they are frequently used to censor content that the Government and other powerful entities do not like or agree with.*
>
> *73. The Special Rapporteur reiterates the call to all States to decriminalize defamation. Additionally, he underscores that protection of national security or countering terrorism cannot be used to justify restricting the right to expression unless it can be demonstrated that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."*

50. This provides general support for the proposition that criminalizing non-intentional defamation is inconsistent with article 19 of the ICCPR and, by implication, section 9 of the Bermuda Constitution as well.

51. Ms. Heather Rogers Q.C.'s 'Written Submissions on Behalf of the Media Legal Defence Initiative' approaches the issue of the constitutional validity of Bermuda's criminal defamation provisions in the following way. Her primary submission is that all forms of criminal defamation are unacceptable; her secondary contention is that if defamation is to continue to be criminalised, criminal sanctions ought only to be available in cases which are serious or where the harm caused is substantial (and never for slander). As the broader issue of whether all criminal defamation sanctions are unconstitutional does not fall for determination in the present case, those aspects of her submissions will only be considered to the extent that they support her secondary position.

52. Ms. Rogers was bound to concede that the European Court of Human Rights has not yet ruled that criminal defamation is, in and of itself, a violation of article 10 of ECHR's

[16] This is authored by Frank La Rue and was submitted to the Seventeenth Session of the of the Human Rights Council: A/HRC/17/27.

freedom of expression protections. She further noted that on October 4, 2007, the European Union Parliamentary Assembly by recommendation 1814 called upon the Committee of Ministers "*to urge all member states to review their defamation laws and, where necessary make amendments in order to bring them into line with the case law of the European Court of Human Rights, with a view to removing any risk of abuse or unjustified prosecutions.*" One of the most pertinent cases cited by counsel, for present purposes, is *Gavrilovici-v-Moldova* application 25464/05 (15 December 2009). In this case the applicant was prosecuted for calling the President of a Regional Council (which body had refused to allocate certain financial assistance to the applicant's son) "a fascist". The applicant was convicted of insulting the complainant and sentenced to five days detention in the regional police station, against a history of having filed 37 previous complaints (including numerous lawsuits) against the official concerned. The Court nevertheless found that the prosecution and conviction contravened the applicant's article 10 rights, noting that (*inter alia*):

> "*60. Finally, the Court recalls that imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article **10** "... only in exceptional circumstances, notably where other fundamental rights have been seriously impaired ..." (see, mutatis mutandis, Cumpănă and Mazăre v. Romania [GC], no. 33348/96, § 115, ECHR 2004-XI).*"

53. The MLDI also referred to what appears to be a trend towards decriminalising defamation altogether, pointing out that no such penalties exist in Bosnia & Herzegovina, Ghana, Georgia, New Zealand, Scotland, Sri Lanka, Ukraine and the United States (in term of Federal law), while Ireland and the United Kingdom (in respect of England & Wales) both recently abolished criminal defamation in 2009. Of the English cases cited illustrating under what principles criminal defamation charges were laid in that jurisdiction before the offence was abolished, I found *Gleaves –v- Insall* [1999] EWHC Admin 215 most helpful. In that case, Kennedy LJ (sitting in the Divisional Court on an appeal from the Magistrates' Court) summarised the nature of the offence of criminal defamation as defined in various previous cases in the following way:

> "17. Criminal libel is a rare form of proceedings this century and, in particular, in the last 20 or 30 years. It is an available option but, as has been made clear on more than one occasion, it is an option only to be resorted to in comparatively exceptional circumstances.
>
> *In Goldsmith v Sperrings Limited and Others (1977) 1 WLR 478, Lord Denning dissenting in that particular case, said this about the nature of criminal libel:*
>
> > *'A criminal libel is so serious that the offender should be punished for it by the state itself. He should either be sent to prison or made to pay a fine to the state itself. Whereas a civil libel does not come up to that degree of enormity.'*

18. That was echoed by Widgery LJ in the case of R v Wells Street Magistrates Court ex parte Deakin (1978) 1 WLR 1008 to which we were referred. In the House of Lords in Gleaves v Deakin (1980) AC 477 the matter received a little further consideration. In that case Viscount Dilhorne at page 486 said, having referred to the remarks of Lord Denning in Goldsmith v Sperrings :

> *'I do not read this passage as an attempt by Lord Denning MR to define what is a criminal libel but as stating the different consequences which flow from the publication of a criminal libel and a libel the subject of civil proceedings. If a man is convicted of criminal libel, it will be for the judge to decide whether it is so serious as to merit imprisonment or fine and it is not for the jury to consider when they are considering their verdict, what sentence may follow a verdict of guilty....*
>
> *I do not think it is right to say that a libel to be criminal must involve the public interest.'*

19. But a little later on, he also said at page 487D:

> *'A criminal libel must be serious libel. If the libel is of such a character as to be likely to disturb the peace of the community or to provoke a breach of the peace, then it is not to be regarded as trivial.'*

20. In somewhat similar vein, Lord Edmund-Davies in the same case at page 491 said:

> *'...the sole task of the examining justice in the present case was to determine on the admissible evidence whether the specified extracts from the defendants' book were sufficiently serious to justify, in the public interest, the institution of criminal proceedings. That, in effect, was also the test propounded by Lord Denning MR in Goldsmith v Sperrings Limited [1977] 1 WLR 478.'*

21. Lord Scarman at page 494 said:

> *'It is, however, not every libel that warrants a criminal prosecution. To warrant prosecution the libel must be sufficiently serious to require the intervention of the Crown in the public interest.'*

22. That, as it seems to me, gives a clear indication of the nature of the material which has to exist before there can be said to be a criminal libel.

If the complaint relates to something much less serious, then it cannot properly be regarded as something which, in the words of Lord Scarman, requires the intervention of the Crown in the public interest."

54. Bermuda's legal system is, of course, quite independent of that of England and Wales. English cases have only persuasive effect under Bermuda law where they deal with either common law principles (as our own common law is English-based) or English statutes containing similar provisions to a relevant local statute law. Bermuda's Criminal Code, while substantially similar in several respects to the Criminal Codes of Queensland and Western Australia, is generally regarded, as regards many offences, as a codified version of the English criminal law which in 1907 was largely common law-based. The only relevance of the English approach to prosecuting criminal defamation has to an assessment of the constitutional validity of Bermuda's criminal defamation laws is by way of illustrating what type of defamatory statement was considered to deserve the intervention of the State in a jurisdiction which at all material times was (a) bound by article 10 ECHR, and (b) had a strong common law tradition of respecting freedom of expression. The English approach to engaging the law of criminal libel (prior to abolition of the offence) supports the view that prosecution should only occur in the public interest, but does not explicitly support a distinction between intentional and non-intentional defamation.

55. One English case which expressly considered the interaction between the offence of defamation and article 10 of ECHR which Ms. Rogers also drew to the Court's attention was the House of Lords decision in *Gleaves-v-Deakin* [1980] A.C. 477. Lord Diplock opined that the consent of the Attorney-General should be a prerequisite for any prosecution; "*the Attorney General could then consider whether the prosecution was necessary on any of the grounds specified in article 10.2 of the Convention and unless satisfied that it was, he should refuse his consent*" (at page 484B-C). Lord Diplock also stated that the effect of the onus being placed on a defendant charged with criminal defamation to prove that the impugned statements were for the public benefit was to "*turn article 10 of the Convention on its head*" (page 483D-F). MLDI submitted that section 214 of the Criminal Code was inconsistent with section 9 of the Bermuda Constitution because it did not require the prosecutor to prove (1) seriousness, (2) necessity and proportionality, and (3) that the public interest required the bringing of proceedings.

56. The Submissions of the Crown purport to oppose the grant of a declaration that section 214(1) is unconstitutional on its face. However no authority is cited in support of the bare submissions that "*given the fact that the imposition of criminal liability in the 'intentional' category of case cannot infringe on principles of free speech; then the extension of the offence to include 'negligent' libel similarly does not encroach on the principles of free speech*" (paragraph 6). Indeed Ms. Clarke concludes with what amounts to a defence of the constitutionality of section 214(2) of the Code (intentional defamation), not section 214(1) at all:

> "*10. The removal or absence of criminal sanctions in respect of a particular type of conduct signifies that it is acceptable conduct. The law should not send out such a message in respect of matter which is published reckless of its defamatory and false character, which can only be designed to injure the victim.*"

57. However, the Court was invited to conclude that the existence of criminal sanctions *per se* could not be unconstitutional because these were routinely used in civil law countries. Moreover, "*criminal liability is incompatible with principles of free speech only when the offence is too wide and captures speech which may be justifiable on moral, theoretical, practical or other grounds*" (paragraph 8). This submission begs the question of how the provisions of section 214(1) of the Criminal Code in their statutory context and on their face distinguish between justifiable and unjustifiable speech. It is not responsive in any reasoned way to the complaint that section 214(1) is so broad as to potentially apply to "speech" which is plainly protected by section 9 of the Constitution.

58. The Skeleton Submissions of the Attorney-General rightly start by pointing out that the Applicant's characterisation of the offence created by section 214(1) as "negligent libel" is misconceived. I agree with Mr. Douglas that section 214(1) makes no reference to negligence at all. The concept of negligent libel considered by the Judicial Committee of the Privy Council in *Worme et al-v Commissioner of Police* [2004] UKPC 8 was a distinctive feature of Grenadian criminal law. Less straightforward is the substantive argument that even the offence under section 214(1) requires proof of an intention to defame; section 214(2) only adds an additional requirement of proof of knowledge of the falsity of the defamatory matter. At first blush, one cannot intend to unlawfully "defame" a person unless one knows that the defamatory statement one is making is false. This is the civil law position; justification or truth is a complete defence. However, under Part XII of the Criminal Code, liability is more extensive than under the civil law (or, rather, the defence of justification is more narrowly available). Truth is only a defence if the remarks, oral or written, are in the public interest as well. However, even accepting this distinction, it is not self-evident why the prosecution have to prove any element of intention whenever a charge under section 214(1) is laid.

59. It seems clear that where an accused raises a defence of fair comment made in good faith, the burden is on the prosecution to prove that the comment was not made in good faith (section 221). This defence can only be made out by establishing that the accused, *inter alia*, *"does not believe the defamatory matter to be untrue*". Section 220 also provides that where a proprietor, publisher or editor (section 217), a seller of books (section 218) or an employer (section 219) is charged, "*the burden of proof of an absence of knowledge lies upon the accused person*". However, having regard to the constitutional presumption of innocence, the prosecution may fairly be regarded as bearing the ultimate burden of proving that the impugned publication is "*unlawful*" in the requisite section 207 sense because it is not "*protected, or justified, or excused by law*". So the Crown very arguably will have to prove on a charge under section 214(1) where a defence of fair comment is relied upon, as much as on a charge under section 214(2), that the accused knows the defamatory matter to be false. Accordingly, the Acting Solicitor-General appears to be right in the broader contention that the elements of the two section 214 offences are not

necessarily clearly distinguishable based on the requirement of knowledge of falsity alone, as superficially seems to be the case. As was submitted by Mr. Douglas, it is for the prosecution to establish that the relevant publication was made "unlawfully".

60. In addition, however, it was argued that the offence under section 214(1) necessarily required proof of an intention to defame as part of the *mens rea* of the offence. Reliance was placed on *Lucas-v- R* [1998] 3 LRC 236 (a Supreme Court of Canada case) and the Tonga Court of Appeal case of *R-v- Pohvia* [2010] 1 LRC 763. The former case concerned a statute which explicitly required an intention to defame; the latter case was more pertinent as the statute did not require any *mens rea* expressly, but the Court implied a requirement that the prosecution prove an intention to publish any matter damaging the reputation of the King. As this finding was reached in relation to a publisher who was wholly unaware of the fact of publication, it is unclear whether the requite intention was merely knowledge of publication of the matter as opposed to a positive intention to defame.

61. The only clear distinction between the two subsections which bears on the relative gravity of the two offences (as opposed to the penalties) would appear to be a charge based on facts where the defences under sections 208-210–reports on court and other proceedings, etc.- do not arise but justification is relied upon. In such a case, an accused person could be convicted under section 214 (1) in circumstances where either (a) the defamatory matter was untrue, even though the accused believed it to be true, and/or (b) the defamatory matter was true, but publication was proved not to have been in the public interest. By way of contrast, the offence under section 214(2) is only ever committed in circumstances where (a) the defamatory matter is false, and (b) known by the accused to have been false.

62. The Attorney-General's reliance on the cases of *Worme -v- The Commissioner of Police* [2004] UKPC 8 (at paragraphs 42 to 43) and *Lucas-v- R* [1998] 3 LRC 236 (at paragraphs 31-83, 88-97) was clearly premised on the assumption that all charges under section 214(1) require proof of an intention to defame. In *Worme*, the following passages in Lord Rodger's judgment are relied upon:

> "*42.For present purposes, the crime of intentional libel, as interpreted by the Board, is committed where a defendant publishes any false defamatory matter, imputing to another person a crime or misconduct in any public office, with the intention of damaging the reputation of that other person, in circumstances where the jury consider that the publication was not for the public benefit. The intention to damage the other person's reputation is important. The law rightly attaches a high value to a person's reputation not only for that individual's sake but also in the wider interests of the public. In Reynolds v Times Newspapers Ltd [2001] 2 AC 127, 201a-c Lord Nicholls of Birkenhead explained the position in this way:*
>
> *'Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a*

democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.'

The protection of good reputation is conducive to the public good. It is also in the public interest that the reputation of public figures should not be debased falsely. Their Lordships are therefore satisfied that the objective of an offence that catches those who attack a person's reputation by accusing him, falsely, of crime or misconduct in public office is sufficiently important to justify limiting the right to freedom of expression. Moreover, the offence is rationally connected to that objective and is limited to situations where the publication was not for the public benefit. Of course, the tort of libel provides a civil remedy for damages against those who make such attacks, but this no more shows that a crime of intentional libel is unnecessary than the existence of the tort of conversion shows that a crime of theft is unnecessary. Similarly, the fact that the law of criminal libel has not been invoked in recent years does not show that it is not needed. After all, prosecutions are in one sense a sign not of the success of a criminal law, but of its failure to prevent the conduct in question. In R v Lucas [1998] 1 SCR 439, at paras 55 and 56 Cory J, for the Supreme Court of Canada, rejected a similar argument against the constitutionality of the crime of defamatory libel in the Canadian Criminal Code:

'55. The appellants argued that the provisions cannot be an effective way of achieving the objective. They contended that this was apparent from the fact that criminal prosecutions for defamation are rare in comparison to civil suits. However, it has been held that '[t]he paucity of prosecutions does not necessarily reflect on the seriousness of the problem', rather it 'might be affected by a number of factors such as the priority which is given

to enforcement by the police and the Crown' (R v Labal [1994] 3 SCR 965, 1007 (emphasis added)). There are numerous provisions in the Code which are rarely invoked, such as theft from oyster beds provided for in section 323 or high treason in section 46. Yet, the infrequency of prosecutions under these provisions does not render them unconstitutional or ineffective. I agree that the small number of prosecutions under section 300 may well be due to its effectiveness in deterring the publication of defamatory libel ...

56. In my view section 300 is rationally connected to the legislative objective of protecting the reputation of individuals.'

For much the same reasons as the Supreme Court, their Lordships reject this particular argument for saying that the crime of intentional libel is not reasonably required in Grenada. Looking at the position overall, they are satisfied that it is indeed reasonably required to protect people's reputations and does not go further than is necessary to accomplish that objective.

43.Nor can the Board say that such a crime is not reasonably justifiable in a democratic society. Of course, some democratic societies get along without it. But that simply shows that its inclusion is not the hallmark of the criminal law of all such societies. In fact criminal libel, in one form or another, is to be found in the law of many democratic societies, such as England, Canada and Australia. It can accordingly be regarded as a justifiable part of the law of the democratic society in Grenada."

63. The First Appellant was the editor of the 'Grenada Today' newspaper, which published a letter accusing the Prime Minister of spending millions to bribe people to vote for him and his party. He and the newspaper were charged with intentional libel. The Judicial Committee expressly declined, as the Applicant's counsel pointed out, to consider whether the offence of negligent libel was constitutionally valid.

64. In the Canadian case of *Lucas,* the appellants protesting the way in which a police officer was handling child sex abuse investigations displayed a sign outside police headquarters accusing the officer himself of abuse. They were convicted of an indictable offence under the following provisions of the Criminal Code: "*300. Everyone who publishes a defamatory libel that he knows is false is guilty of an indictable offence…*" The Supreme Court of Canada was required to determine whether this offence contravened the appellants' freedom of expression rights. The most significant portions of the extensive first passages relied upon by Mr. Douglas (in the leading judgment of Cory J), came after a review of the English approach to criminal libel, which was found to be persuasive:

"[*68]Accordingly, the Crown can only make out the offence of defamatory libel if it proves beyond a reasonable doubt that the accused intended to*

defame the victim. This requirement places a sufficiently onerous burden on the Crown to make the mens rea aspect of the provision minimally intrusive…

[79] I agree that the provision would be overly intrusive if it were to be construed so that mere insults should constitute a criminal offence. However, the provision must be read in the context of the purpose of the section to protect the reputation of individuals. As well it must, as a criminal statute, be interpreted so as to give the accused the greatest protection possible.

[80] In order to interpret the words "designed to insult" appearing in s. 298, the French version of the section must be considered. This was the approach carefully adopted by Lamer J. (as he then was) in R. v. Collins, [1987] 1 S.C.R. 265, at p. 287. There the French version of s. 24(2) of the Charter was utilized to determine the appropriate threshold for the exclusion of evidence. Although the English version mandates exclusion where the admission of evidence "would bring the administration of justice into disrepute", he found that the French text used a lower threshold through the words "est susceptible de déconsidérer l'administration de la justice". In order to give proper effect to the purpose of s. 24(2) to protect the accused's right to a fair trial, Lamer J. read s. 24(2) in accordance with the less onerous French text and concluded that the exclusion of evidence was required whenever the admission could bring the administration of justice into disrepute.

[81] In this case, the language used in the French text indicates a higher threshold with respect to defamatory insults. The French version of the Code provides as a definition of defamatory libel a published matter which is "destinée à outrager". The use of the word "outrager" rather than the literal translation of "insult" suggests a grave insult is necessary and that anything less will not be sufficient to trigger the defamatory libel provisions. According to Le Nouveau Petit Robert (1996), "outrager" means"[o]ffenser gravement par un outrage (actes ou paroles)"; "outrage" is defined as "[o]ffense ou injure extrêmement grave (de parole ou de fait)". The stronger meaning of the term "outrage" is clear when one notes the other places in the French version of the Code where it is used. For instance, the offence of contempt of court in s. 708 is referred to as "outrage au tribunal" in the French version. "Outrage" is also used in
s. 182(b) ("outrage . . . envers un cadavre") which prohibits the offering of any indignity to human remains.

[82] When s. 298 is read in the context of the aim of the section and the French text is taken into account it becomes apparent that the phrase "or

that is designed to insult the person" should be read as requiring proof of a grave insult. Thus, the inclusion of insults in the definition of defamatory libel is minimally impairing."

65. So the leading judgment in this Supreme Court of Canada decision provides no obvious support for the constitutional permissibility of criminal sanctions for non-intentional defamation. On the contrary it emphasises that the criminal defamation provisions in question were constitutionally valid because they required (a) proof of an intention to defame, and (b) proof of a "*grave insult*". It is in this statutory context that Cory J went on to opine (in one of the passages on which Mr. Douglas also relied):

> "[*93] Most certainly defamatory libel is far from and indeed inimical to the core values of freedom of expression. It would trivialize and demean the magnificent panoply of rights guaranteed by the Charter if a significant value was attached to the deliberate recounting of defamatory lies that are likely to expose a person to hatred, ridicule or contempt.*
>
> *[94] It is thus clear that defamatory libel is so far removed from the core values of freedom of expression that it merits but scant protection. This low degree of protection can also be supported by the meritorious objective of the impugned sections. They are designed to protect the reputation of the individual. This is the attribute which is most highly sought after, prized and cherished by most individuals. The enjoyment of a good reputation in the community is to be valued beyond riches.*"

66. The view that the content of defamatory libel was relevant to the question of whether criminal sanctions were constitutionally acceptable was doubted (at paragraph [116]) by McLachlin J (as she then was). In summary, however, the submissions advanced on behalf of the Attorney-General clearly demonstrated that the application for a declaration that section 214(1) contravenes section 9(1) of the Constitution requires careful scrutiny.

Findings: does section 214(1) of the Criminal Code contravene section 9 of the Constitution?

67. The decisions of the Judicial Committee of the Privy Council, the European Court of Human Rights and the Supreme Court of Canada to which I have been referred strongly support the conclusion that the criminal prohibition of non-intentional defamation contained in section 214(1) of the Criminal Code is an impermissible infringement of the guarantees for freedom of expression contained in section 9 of the Bermuda Constitution. However, this subsection does, by necessary implication, permit the laying of a summary information in cases where an intention to defame must be proved (notably to rebut a fair comment defence). This potentially would be constitutionally permissible and less

intrusive of free speech rights than requiring any intentional defamation charge to be proceeded with on indictment, depending on the facts of each case.

68. Accordingly, applying section 5 (1) of the Bermuda Constitution Order to the Criminal Code as an "existing law", and for the additional reasons explained below, I would hold that to bring section 214 into conformity with section 9 of the Constitution, it should be read (subject to hearing counsel if required) with the following modifications:

> "***Unlawfully publishing defamatory matter***
> *214 [^] Any person who unlawfully publishes any defamatory matter concerning another person knowing the defamatory matter to be false is guilty of an [^]offence, and is liable to imprisonment for twelve months upon summary conviction and[^] on conviction on indictment to imprisonment for two years,*
>
> *Provided that charge shall be laid under this section without the consent expressed in writing of the Director of Public Prosecutions.*" [modified version]

> "***Unlawfully publishing defamatory matter***
> *214 (1) Any person who unlawfully publishes any defamatory matter concerning another person is guilty of a summary offence, and is liable to imprisonment for twelve months.*
>
> *(2) If the offender knows the defamatory matter to be false, he is liable on conviction on indictment to imprisonment for two years.*"
>
> [present version]

69. Section 214(1) on its face and read in its statutory context presently permits a charge of criminal defamation to be laid in respect of non-intentional (and even non-negligent) defamation in circumstances where the statement is not made on a protected occasion. The only mental element of this offence which I am satisfied has to be proved is that the accused intended to publish the material in question; this is the way I would construe the Tongan Court of Appeal (Burchett, Salmon and Moore JJ) decision in R-v-Pohiva [2010] 1 LRC 763 at paragraphs [12]-[13].

70. In such cases the Crown need not prove aggravating elements such as ill-will or an absence of good faith (including an intention to defame). Moreover, the narrow scope of the criminal defence of justification under section 212 of the Code would mean that a person could potentially be charged in circumstances where the defamatory statement was true but not made for the public benefit. Rendering such statements criminal clearly interferes with freedom of expression contrary to section 9(1) of the Constitution. Neither the Respondent nor the Attorney-General has shown that criminalizing defamation to such an extent is "*reasonably required*" in accordance with section 9(2) :

> "*(i) in the interests of defence, public safety, public order, public morality or public health; or*
>
> *(ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments…*"

71. The only apparent justification for section 214 is "*protecting the…reputations…of other persons*". This Court is bound to approach the question of whether the provisions of section 214(1) of the Criminal Code impermissibly interfere with freedom of expression applying the following test applied by the Judicial Committee of the Privy Council in *Worme and another-v-The Commissioner of Police* [2004] UKPC 8:

> "[40] *In de Freitas v Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80 the Board adopted the analysis of Gubbay CJ in Nyambirai v National Social Security Authority [1996] 1 LRC 64, 75 for determining whether a limitation on freedom of expression is arbitrary or excessive:*
>
> *'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*'"

72. This is a more nuanced approach to justifying incursions with fundamental rights than the European Court of Human Rights' requirement that the State should demonstrate a "pressing social need" for the interference in question. I am bound to find that protecting the reputations of others is sufficiently important to justify limiting freedom of expression and that the criminal law of defamation contained in Part XII of the Criminal Code is rationally connected with this legislative object *in general terms*. This was the finding of the Judicial Committee in *Worme* (at paragraph 42, approving the equivalent finding of the Cory J in *Lucas and Another-v- R* [1998] 3 LRC 236 at paragraphs [55]-[56]). Where the parties to the present application have essentially disagreed is whether the provisions of section 214(1) of the Criminal Code, read with Part XII as a whole, "*are no more than is necessary to accomplish the objective.*" In both the Grenadian and the Canadian case, it was held that an offence of intentional defamation went no further than was necessary to

achieve the legislative objective[17]. Although the issue of non-intentional libel did not arise in either case, it was noteworthy that in *Worme* the only alternative offence was "negligent libel". In *Lucas*, the only offence appears to have been publishing a libel known to be false. Nevertheless, Lord Rodger in *Worme* clearly placed reliance on the fact that the offence before the Privy Council Board contained an element of aggravation[18]:

> "*42.For present purposes, the crime of intentional libel, as interpreted by the Board, is committed where a defendant publishes any false defamatory matter, imputing to another person a crime or misconduct in any public office, with the intention of damaging the reputation of that other person, in circumstances where the jury consider that the publication was not for the public benefit. The intention to damage the other person's reputation is important.*" [emphasis added]

73. The crucial question is whether criminalizing non-intentional defamation (in the Bermudian legislative sense) goes no further than is necessary to achieve the permitted legislative goal. The ECHR jurisprudence describes this as "proportionality"; the Canadian Supreme Court describes this as the "*minimal impairment analysis*" (per Cory J at paragraph [57] of *Lucas*. Being bound by the Judicial Committee approach to a substantially similar Grenadian constitutional clause to our own section 9 in *Worme*, I consider the approach of McLachlin J to this issue in *Lucas* to be persuasive:

> "*[116] In my view, justice is better served if the Crown is required to demonstrate a pressing and substantial objective, rational connection and minimal impairment independent of the perception that the content of the expressive activity is offensive or without value, as suggested by Professor Jamie Cameron, "The Past, Present, and Future of Expressive Freedom Under the Charter" (1997), 35 Osgoode Hall L.J. 1. At the pressing and substantial objective stage, the concern is whether the limitation on the right has the objective or purpose of addressing a real and substantial harm or risk of harm.*
> *It may be relevant to consider the nature of the expression at issue in order to determine the evil to which the limitation is directed, as part of the assessment of whether the objective is pressing and substantial. Beyond this, however, the value of the expression cannot assist. At the rational connection stage, the focus is on whether there is a link based on reason or logic between the objective and the limitation of the right. Here the value of the expression at issue is of no assistance. The minimal impairment inquiry focuses on whether the legislature has restricted the Charter right as little as reasonably possible to achieve the desired objective. Here also, the inquiry focuses on the legislation at issue, i.e.*

[17] In the Grenadian case, however, the requisite intention was not knowledge of falsity, as in the Canadian and our own case, but an intention to defame. For present purposes, this distinction appears to me to be irrelevant.
[18] Ssimilar but somewhat different to the offences then in force under English law:Judgment, paragraph 22)

its reach or breadth, not on the value of the restricted expression." [emphasis added]

74. In the absence of direct authority on the question of how one draws a figurative demarcation line between unreasonable criminal legislative reach or breadth and reasonable minimal impairment of freedom of expression, I find that a useful guide is to be found in judicial pronouncements about when the discretion to prosecute ought to be exercised. Section 214(1), after all, creates a summary offence which can be privately prosecuted if the Director of Public Prosecutions declines to proceed; charges on indictment can only be privately preferred with leave of a Supreme Court judge: see Criminal Code, sections 485(2)(c), 555. In *Gleaves-v- Deakin et al* [1980] A.C. 477, the House of Lords were required to consider what constituted *prima facie* evidence of defamation for the purposes of committal proceedings. The unanimous view was that the criminal law should only be engaged where some public interest was raised by a serious libel. Lord Edmund Davies was satisfied that the facts in that case included "*allegations of some considerable gravity, which involved the public interest and far exceeded 'an individual squabble between two people'*" (at page 492A). More modern authority makes it clear that protecting an individual's reputational damage may be in and of itself in the public interest, but it is difficult to see how the public interest will be engaged in relation to minor or unintentional defamation.

75. Although the European Court of Human Rights cases do not address the scope of criminal defamation legislation in terms of compliance with article 10 ECHR, they still indirectly support the proposition that the content scope of such legislation should be narrow rather than broad. Because even where charges were laid in respect of intentional defamation, the Court held that the application of the criminal law was not justified on the facts: *Raichinov-v-Bulgaria* (2008) 46 EHRR 28; *Gavrilovici-v-Moldova*, Application 25264/05. In the latter case, the Court opined:

> "*60. Finally, the Court recalls that imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article **10** "... only in exceptional circumstances, notably where other fundamental rights have been seriously impaired ..." (see, mutatis mutandis, Cumpănă and Mazăre v. Romania [GC], no. 33348/96, § 115, ECHR 2004-XI).*"

76. If criminal charges can only be laid for defamation in "exceptional circumstances", in my judgment criminal liability for defamation may only reasonably be legislated in terms which are designed to justify charges on appropriate facts. If potential criminal liability is only permissible within section 9(2) of the Constitution so as to minimally impair freedom of expression under section 9(1), the relevant offence should on its face engage only serious abuses of free speech. This is supported by the absence of any criminal defamation laws in the United States (with which Bermuda has strong cultural and economic ties), what appears to be (possibly) an emerging trend towards repealing criminal defamation laws altogether and by reference to the form that criminal defamation laws presently take in established democratic countries. It is also supported

by our own Parliament's own view of what constitutes a serious case of criminal defamation, namely the offence created which can only presently be charged on indictment. Section 214 provides:

> "***Unlawfully publishing defamatory matter***
> *214 (1) Any person who unlawfully publishes any defamatory matter concerning another person is guilty of a summary offence, and is liable to imprisonment for twelve months.*
>
> *(2) If the offender knows the defamatory matter to be false, he is liable on conviction on indictment to imprisonment for two years.*" [emphasis added]

77. In my judgment criminalizing defamatory expression which is so trivial that it encompasses (a) statements not intended to injure and/or not known to be false, and (b) conduct so lacking in severity that it can only be tried summarily, goes beyond what is reasonably required to prevent reputational damage to individual citizens and/or public officials, bearing in mind the existence of alternative civil relief. Neither the Respondent nor the Attorney-General have advanced any convincing case for section 214(1) to be given such an extensive reach in terms of restricting the freedom of expression rights guaranteed by section 9(1) of the Constitution. The scope of impairment of free speech is aggravated by the fact that truth, in the absence of a public interest in publication, is not a defence to a criminal defamation charge as it is in the context of a civil defamation claim. Moreover, either party to a civil defamation suit has the right under Order 33 rule 2 to apply for trial by jury. If the Prosecution (or a private prosecutor) elects to lay a charge under section 214(1) of the Criminal Code, it can only be tried summarily. A further difficulty with section 214(1) on its face is that a private prosecution can seemingly be commenced in circumstances where the Director of Public Prosecutions has formed the view that the public interest does not require a prosecution. If Lord Diplock's observations in *Gleaves –v-Deakin et al* [1980] 1 A.C. 477 at 483F that the equivalent English position was inconsistent with article 10 of ECHR are correct, this constitutes a further way in which section 214(1) on its face impermissibly restrains freedom of expression under Bermudian law.

78. Mr. Attridge for the Applicant complained about the irrationality of the fact that leave of a judge was required before the proprietor of a newspaper could be charged (section 222), while no such leave was required under section 214. I accept this submission to the following extent. The unanimous view of the House of Lords in *Gleaves –v-Deakin et al* [1980] 1 A.C. 477 was that:

    (1) the English criminal libel provisions were unsatisfactory in giving the courts any role in the discretion to prosecute process;
    (2) in all cases the public prosecuting authorities should be required to consent to the commencement of criminal defamation proceedings to ensure that the relevant complaint sufficiently engaged the public interest: see Lord Diplock

(page 484 B-C), Viscount Dilhorne (pages 487H-488B), Lord Edmund-Davies (page 493D), Lord Keith (494A), and Lord Scarman (page 496E-F).

79. For the purposes of the present application, I find the following observations of Lord Diplock (at page 484C) to be most pertinent:

> "*In deciding whether to grant his consent in the particular case, the Attorney-General could then consider whether the prosecution was necessary on any of the grounds specified in article 10.2 of the Convention and unless satisfied that it was, he should refuse his consent.*"

80. In summary, section 214(1) is inconsistent with section 9(2) of the Constitution and unreasonably interferes with the freedom of expression rights protected by section 9(1) in the following three key respects. Firstly, it permits prosecutions for defamation sufficiently trivial to warrant categorization as a summary offence. Secondly, it permits prosecutions for non-intentional defamation. Thirdly, there is no adequate mechanism to ensure that private prosecutions are only commenced in circumstances which appear to the public prosecuting authorities to be reasonably required within section 9(2). It remains to consider how section 214(1), as an existing law, should be construed so as to bring it into conformity with the Constitution, as required by section 5(1) of the Bermuda Constitution Order, which (it bears repeating), provides as follows:

> "*5 (1) Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*"

81. For the above reasons, I find that the provisions of section 214 (1) should be modified so as to bring them into conformity with section 9 of the Constitution , subject to hearing counsel on the precise terms of the order to be drawn up to give effect to the present Judgment. The intended effect of the modifications is to read out of section 214 the existing summary only and indictable only offences altogether, and to adapt the section by creating a single offence which is triable either summarily or on indictment which offence requires proof that the defendant knew the defamatory statement was false. In addition, the section is modified so as to require that no prosecution can be commenced without the written consent of the Director of Public Prosecutions, the implicit understanding being that he will satisfy himself that the facts of the case fall within section 9(2) of the Constitution. The section would now read as follows:

"***Unlawfully publishing defamatory matter***
214 [^] Any person who unlawfully publishes any defamatory matter concerning another person knowing the defamatory matter to be false is guilty of an [^]offence, and is liable to imprisonment for twelve months upon summary conviction and[^] on conviction on indictment to imprisonment for two years,

Provided that no charge shall be laid under this section without the consent expressed in writing of the Director of Public Prosecutions."

82. It is not open to me in the context of the present application to decide whether other aspects of Part XII of the Criminal Code offend section 9 of the Constitution, although it would be surprising if this were not the case. These provisions are based on the English Libel Act 1843; criminal libel was abolished altogether in that country in 2009. Two decades earlier in a judgment delivered on April 10, 2009, Lord Diplock made the following observations about the English offence of criminal defamation which probably hold good for its Bermudian counterpart provisions (which have not been considered in this Judgment) today:

> "*The examination of the legal characteristics of the criminal offence of defamatory libel as it survives today, which has been rendered necessary in order to dispose of this appeal, has left me with the conviction that this particular offence has retained anomalies which involve serious departures from accepted principles upon which the modern law of England is based and are difficult to reconcile with international obligations which this country has undertaken by becoming a party to the European Convention on Human Rights and Fundamental Freedoms (1953)…*"[19]

Conclusion

83. The Applicant is entitled to a declaration that his prosecution for unlawful defamation (in relation to a Facebook posting suggesting that a Police Inspector involved in his prosecution for a previous minor criminal offence, and for which the Applicant was conditionally discharged by the Magistrates' Court, might be a racist) contravened his rights of freedom of expression in contravention of section 9 of the Bermuda Constitution. Section 9 is substantially similar to article 10 of the European Convention on Human Rights and highly persuasive decisions of the European Court of Human Rights strongly support both this conclusion and the Respondent's decision to concede this point.

84. The Applicant is further and in any event entitled to a declaration that section 214(1) of the Criminal Code is on its face invalid for contravening section 9 of the Bermuda

[19] *Gleaves-v-Deakin* [1980] A.C. 477 at 482G.

Constitution. Section 5(1) of the Bermuda Constitution Order requires any existing law such as the Criminal Code 1907 to be "*read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*" The offending aspects of section 214 are that: (1) it restricts freedom of expression in relation to conduct sufficiently trivial so as to be categorized as a summary offence only; (2) it criminalizes non-intentional defamation; and (3) the offence may be charged by way of private prosecution without the Director of Public Prosecutions determining that the matter is sufficiently serious as to warrant the laying of a criminal charge within the reasonable requirements specified in section 9(2) of the Constitution. Subject to hearing counsel on the precise terms of the Order to be drawn up to give effect to the present Judgment, I have set out above the way in which I consider section 214 should now be read and construed.

85. I will hear counsel as to costs, although there is no obvious reason why the costs of the present application should not be awarded to the Applicant as against the Respondent, with the Attorney General (and the Media Legal Defence Initiative, which did not formally appear) each bearing their own costs.

Dated this 12th day of August, 2011 _____
KAWALEY J

APPENDIX

(CRIMINAL CODE ACT 1907 EXTRACTS)

"***PART XII***

DEFAMATION

Interpretation and construction of Part XII

205 (1) In this Part "periodical" includes any newspaper, review, magazine or other writing or print published periodically.

(2) Any imputation concerning any person, or any member of his family, whether living or dead, by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession, occupation or trade, or by which other persons are likely to be induced to shun, or avoid, or ridicule, or despise him, is called defamatory, and the matter of the imputation is called defamatory matter.

(3) An imputation may be expressed either directly or by insinuation or irony.

(4) Any person who, by spoken words or audible sounds, or by words intended to be read either by sight or touch, or by signs, signals, gestures, or visible representations, publishes any defamatory imputation concerning any person is said to defame that person.

(5) Publication is, in the case of spoken words or audible sounds, the speaking of such words or the making of such sounds in the presence and hearing of any person other than the person defamed, and, in the case of signs, signals, or gestures, the making of such signs, signals, or gestures, so as to be seen or felt by, or otherwise come to the knowledge of, any person other than the person defamed, and, in the case of other defamatory matter, the exhibiting of it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with view to its being read or seen by any person other than the person defamed.

Questions of fact and law with respect to defamation

206 (1) The question whether any matter is or is not defamatory is declared to be a question of fact.

(2) The question whether any matter alleged to be defamatory is or is not capable of bearing a defamatory meaning is declared to be a question of law.

(3) Whether any defamatory matter is or is not relevant to any other matter, and whether the public discussion of any subject is or is not for the public benefit, are declared to be questions of fact.

Publication of defamatory matter prima facie unlawful
207 It is unlawful to publish any defamatory matter unless such publication is protected, or justified, or excused, by law.

Absolute protection: proceedings in courts of justice and at inquiries
208 A person does not incur any liability as for defamation by publishing, in the course of a proceedings held before or under the authority of any court of justice, or in the course of an inquiry made under the authority of any court of justice, or in the course of an inquiry made under the authority of an Act or of an Act of the Parliament of the United Kingdom, or under the authority of Her Majesty, or of the Governor, any defamatory matter.

Absolute protection: reports of official inquiries
209 A person appointed under the authority of an Act or of an Act of the Parliament of the United Kingdom, or by or under the authority of Her Majesty, or of the Governor, to hold any inquiry, does not incur any liability as for defamation by publishing any defamatory matter in an official report made by him of the result of such inquiry.

Protection: reports of matter of public interest
210 (1) It is lawful to publish in good faith and for the information of the public—

(a) a fair report of the public proceedings of any court of justice, whether such proceedings are preliminary or interlocutory or final, or of the result of any such proceedings, unless, in the case of proceedings which are not final, the publication has been prohibited by the court or a judge, or unless the matter published is blasphemous or obscene;

(b) a fair report of the proceedings of any inquiry held under the authority of an Act or of an Act of the Parliament of the United Kingdom, or by or under the authority of Her Majesty, or of the Governor or an extract from or abstract of any such proceedings, or a copy of, or extract from, or abstract of, an official report made by the per-son by whom the inquiry was held;

(c) at the request of any Government Department, public authority, public officer or police officer, any notice or report issued by such department, authority or officer for the information of the public;

(d) a fair report of the proceedings of any public authority or other persons duly constituted under the provisions of any Act or Act of the Parliament of the United Kingdom for the

discharge of public functions, so far as the matter published relates to matters of public concern;

(e) a fair report of the proceedings of any public meeting, so far as the matter published relates to matters of public concern.

(2) A publication is said to be made in good faith for the information of the public if the person by whom it is made is not actuated in making it by ill-will to the person defamed, or by any other improper motive, and if the manner of the publication is such as is ordinarily and fairly used in the case of publication of news.

(3) In the case of a publication of a report of the proceedings of a public meeting in a periodical, it is evidence of want of good faith if the proprietor, publisher, or editor, has been requested by the person de-famed to publish in the periodical a reasonable letter or statement by way of contradiction or explanation of the defamatory matter, and has refused or neglected to publish the same.

(4) "public meeting" includes any meeting lawfully held for a lawful purpose, and for the furtherance or discussion in good faith of a matter of public concern, or for the advocacy of the candidature of any person for a public office, whether the admission to the meeting was open or restricted.

Protection: fair comment

211 (1) It is lawful to publish a fair comment respecting—

(a) any of the matters with respect to which the publication of a fair report in good faith for the information of the public is by section 210 declared to be lawful;

(b) the public conduct of any person who takes part in public affairs, or respecting the character of any such per-son, so far as his character appears in that conduct;

(c) the conduct of any public officer or public servant in the discharge of his public functions, or respecting the character of any such person, so far as his character appears in that conduct;

(d) the merits of any case, civil or criminal, which has been decided by any court of justice, or respecting the con-duct of any person as a judge, party, witness, counsel or officer of the court, in any such case, or respecting the character of any such person, so far as his character appears in that conduct;

(e) any published book or other literary production, or respecting the character of the author, so far as his character appears by such book or production;

(f) any composition or work of art, or performance publicly exhibited, or respecting the character of the author or performer or exhibitor, so far as his character appears from the matter exhibited;

(g) any public entertainment or sports, or respecting the character of any person conducting or taking part therein, so far as his character appears from the matter of the entertainment or sports, or the manner of con-ducting the same; or

(h) any communication made to the public on any subject.

(2) Whether a comment is or is not fair is declared to be a question of fact.

(3) If a comment is not fair, and is defamatory, the publication of the comment is unlawful.

Protection: truth

212 It is lawful to publish defamatory matter if the matter is true, and if it is for the public benefit that the publication complained of should be made.

Qualified protection: excuse

213 (1) It is a lawful excuse for the publication of defamatory matter if the publication is made in good faith—

(a) by a person having over another person any lawful authority in the course of a censure passed by him on the conduct of that other person in matters to which such lawful authority relates;

(b) for the purpose of seeking a remedy or redress for some private or public wrong or grievance from a person who has, or whom the person making the publication believes, on reasonable grounds, to have, authority over the person defamed with respect to the subject matter of such wrong or grievance;

(c) for the protection of the interests of the person making the publication, or of some other person, or for the public good;

(d) in answer to an inquiry made of the person making the publication relating to some subject as to which the per-son by whom or on whose behalf the inquiry is made has, or is believed, on reasonable grounds, by the person making the publication to have, an interest in knowing the truth;

(e) for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has, or is believed, on reasonable grounds, by

the person making the publication to have, such an interest in knowing the truth as to make his conduct in making the publication reasonable under the circumstances;

(f) on the invitation or challenge of the person defamed;

(g) in order to answer or refute some other defamatory matter published by the person defamed concerning the person making the publication or some other person;

(h) in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair.

(2) For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to matters the existence of which may excuse the publication in good faith of defamatory matter—

(a) if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and

(b) if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue.

Unlawfully publishing defamatory matter

214 (1) Any person who unlawfully publishes any defamatory matter concerning another person is guilty of a summary offence, and is liable to imprisonment for twelve months.

(2) If the offender knows the defamatory matter to be false, he is liable on conviction on indictment to imprisonment for two years.

Defence in case defamation by words, sounds, signs, signals or gestures

216 In any case other than that of words to be read, it is a defence to a prosecution for publishing defamatory matter to prove that the publication was made on an occasion and under circumstances when the person defamed was not likely to be injured thereby.

Liability of proprietor, publisher and editor of periodical

217 (1) Upon a charge against a proprietor, publisher or editor, of a periodical, of the unlawful publication in the periodical of defamatory matter, it is a defence to prove that the matter complained of was inserted in the periodical without his knowledge, and without negligence on his part.

(2) General authority given to the person who actually inserted the defamatory matter to manage or conduct the periodical as editor

or otherwise, and to insert therein what in his discretion he thinks fit, is declared not to be negligence within the meaning of this section, unless it is proved that the proprietor, or publisher, or editor, when giving such general authority, meant that it should extend to and authorize the un-lawful publication of a defamatory matter, or continued such general authority, knowing that it had been exercised by unlawfully publishing defamatory matter in any number or part of the periodical.

Protection of innocent seller of periodicals, books etc

218 (1) A person is not criminally responsible as for the unlawful publication of defamatory matter merely by reason of selling any number or part of a periodical containing the defamatory matter, unless he knows that such number or part contains the defamatory matter, or that defamatory matter is habitually or frequently contained in that periodical.

(2) A person is not criminally responsible as for the unlawful publication of defamatory matter merely by reason of selling a book, pamphlet, print or writing, or other thing not forming part of a periodical, although it contains the defamatory matter, if at the time of sale he does not know that the defamatory matter is contained therein.

Protection of employers

219 An employer is not responsible as for the unlawful publication of defamatory matter merely by reason of the sale by his servant of a book, pamphlet, print, writing or other thing, whether a periodical or not, containing the defamatory matter, unless it is proved that he authorized the sale, knowing that the book, pamphlet, print, writing or other thing, contained the defamatory matter, or, in the case of a number or part of a periodical, that defamatory matter was habitually or frequently contained in that periodical.

Proof of knowledge

220 When any question arises, under section 217, 218 or 219, whether the publication of any defamatory matter was or was not made with the knowledge of the accused person, then the burden of proof of the absence of knowledge lies upon the accused person.

Proof of good faith

221 When any question arises whether a publication of defamatory matter was or was not made in good faith, and it appears that the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith, then the burden of proof of the absence of good faith lies upon the party alleging such absence.

Prosecution of newspapers to be by sanction of a judge after notice

222 No criminal prosecution shall be commenced against the proprietor, or publisher, or editor, or any person responsible for the publication of, any periodical, for the unlawful publication of any defamatory matter contained therein, except by order of a judge made after notice to the person accused, and after that person has had an opportunity of being heard in opposition to the application for the order."