SUPREME COURT LIBRARY
KINGSTON
JAMAICA
Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO C. L. H138/1996

BETWEEN	LESLIE HARPER	CLAIMANT
A N D	EDWARD SEAGA	DEFENDANT

Lord Anthony Gifford, Q.C. and Stacey Kong-Quee for Claimant instructed by Gifford Thompson & Bright.

Emil George, Q.C. & Tricia McNeil for Defendant instructed by Dunn Cox for Defendant.

CORAM: BROOKS, J.

HEARD 28TH OCTOBER AND 11TH DECEMBER, 2003

Defamation cases require courts to balance competing interests in an attempt to achieve justice. Those competing interests are, on the one hand the individual's right to have his, presumed good, reputation not tarnished by others, and on the other hand the constitutionally protected right of the individual to freedom of expression.

There are some cases in which the person asserting his right of freedom of expression does not allege that what he has said about another is actually true but that:

(a) he believed it to be true,

(b) he had a duty to communicate its contents to his listeners, and

(c) his listeners had an equal interest or duty to receive the communication.

The assertion is conveniently called a defence of qualified privilege.

This is one of those cases.

Mr. Leslie Harper was, on the 6th March 1996, a Deputy Commissioner of the Jamaica Constabulary Force. Mr. Edward Seaga was on that date the Leader of Opposition and leader of the Jamaica Labour Party.

Mr. Seaga, at a meeting organized by his party and in the presence of the media, used words which Mr. Harper says meant that he, Harper, was politically biased in the conduct of his official duties.

Mr. Harper, aggrieved by Mr. Seaga's words, has sued for damages for defamation of his character. Mr. Seaga, in his defence, has admitted that he used the words complained of but asserts that he was duty-bound to do so by virtue of his position, based on the nature of the information and based on its importance to the Jamaican public.

The task for the court is to determine which of these competing interests should prevail. In carrying out this task I shall make the following assessments:

(a) what was Mr. Harper's position?

(b) what is the meaning of the words used by Mr. Seaga and were they defamatory of Mr. Harper?

(c) was the occasion one entitled to the protection of qualified privilege?

(d) if it was not, to what relief if any, is Mr. Harper entitled?

What was Mr. Harper's position?

Mr. Harper, up to the time of Mr. Seaga's statement, had spent thirty-four years in the Jamaica Constabulary Force. He rose through the ranks to achieve the distinction of being appointed a Deputy Commissioner of Police.

The contract of the then Commissioner of Police, Colonel Trevor McMillan, was to have expired within three months of the date of the statement and it seems to be common ground between the parties in this case, though not for an agreed reason, that Mr. Harper was one of the persons considered as eligible to succeed Col. McMillan.

What is the meaning of the words used by Mr. Seaga and were they defamatory of Mr. Harper?

In assessing this aspect it is necessary to set out in full the words complained of. They are as follows:

> "Part of the strategy is to get rid of the present Commissioner of Police and to put in place someone whose credentials as a PNP activist are impeccable, reliable, solidly supported – a

> distinguished supporter of the P.N.P. The only difference being that he is in uniform.
>
> Mr. Harper who is considered to be the person to replace Trevor McMillan is someone who we cannot and never will be able to support, because it is re-creating the conditions of 1993 when a similar type of Commissioner was in the post who did everything to turn a blind eye in that election."

One of my first tasks is to decide what meaning these words are capable of bearing and whether they are capable of being taken as referring to Mr. Harper.

Since I am not sitting with a Jury I am also to decide the particular meaning that the words used do in fact bear. (*Clerk & Lindsell on Torts* – 14th Edition paragraph 1699.)

Mr. Harper has pleaded that in their natural and ordinary meaning, the words meant and were understood to mean:-

"(i) that (he) was unable to carry out his duties as a senior officer with impartiality,

(ii) that (he) was motivated in the conduct of his said duties by political bias, and,

(iii) that (he) was unfit to hold the office of Commissioner of Police because he would be affected by political bias and partisanship."

The Defence filed by Mr. Seaga neither admitted nor denied these pleaded interpretations.

In the conduct of the case, especially in Mr. George Q.C.'s cross-examination of Mr. Harper, it was Mr. Seaga's stance that the impartiality of the Police Force especially the impartiality of its leadership was essential to good governance. It was also suggested by Mr. George in that context that it was the duty of the leadership of the force to have politically biased members expelled. Against that background Mr. George suggested in cross-examination to Mr. Harper that he had a known political bias. In his closing submissions Mr. George submitted that "the object of Mr. Seaga's speech was not to condemn Mr. Harper as Deputy Commissioner but to alert the country to the fact that he was unfit to be Commissioner in the future." Mr. George went on to say, "Mr. Seaga wasn't complaining of his conduct as Deputy Commissioner in that sense."

Police officers, of whatever rank, are required not only to be impartial in the conduct of their duties but must be seen to be impartial by the public that they serve. An assertion therefore that a police officer, particularly a very senior officer, is politically biased, strikes at the very root of this vital requirement for the conduct of that officer's public office.

Based on what I have said about the position of a police officer I cannot accept that Mr. Seaga's statement can hold such a restricted meaning as Mr. George submits that it does. Having considered the words used and the manner in which the case was conducted I find that the words:

(a) are capable of the meaning alleged by Mr. Harper

(b) were clearly used in reference to Mr. Harper, and

(c) do it fact bear the natural and ordinary meanings as alleged by Mr. Harper.

I therefore find that the words complained of were defamatory of Mr. Harper in his office of Deputy Commissioner of Police.

<u>What was the nature of the occasion at which the statement was made?</u>

It is not disputed that the statement was made at a meeting organized by the Jamaica Labour Party. Mr. Seaga's evidence is that the meeting was one of a series of meetings so organized. It was held at the Wyndham Hotel, Knutsford Boulevard in Saint Andrew, was open to the public and the media would have been alerted that it was being held. In answer to interrogatories Mr. Seaga admitted that the media was in fact present. He testified that the media usually, but not necessarily always, attended such meetings.

Mr. Seaga testified in cross-examination that the meeting had been called to highlight "the state of the country, (and that there were) several presentations, one of which was about Mr. Harper."

It is also Mr. Harper's uncontradicted evidence that the words used by Mr. Seaga were broadcasted on R.J.R. (a radio station), C.V.M Television (station) and were published in the Jamaica Herald and Daily Observer newspapers. No evidence was given concerning the circulation of each of these media but I do not think I would do injustice to take judicial notice that they all have national coverage.

This therefore is the setting in which Mr. Seaga uttered the words complained of. I shall explain later in this judgment why I view the setting as being important.

Was the occasion one entitled to the protection of qualified privilege?

This question has to be analysed in the context of an often quoted statement by Lord Atkinson in the case of *Adam v. Ward* (1916 – 17) ALL E.R. Rep 157 at p. 170 where he said:-

> "It was not disputed in this case on either side that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

It is therefore necessary to determine whether Mr. Seaga had a duty, legal, social or moral to make the statement complained of.

Position of the Leader of the Opposition

The post of Leader of the Opposition is one enshrined in the Constitution of Jamaica. The holder of that post is, by Section 1 (6) of the Jamaica (Constitution) Order in Council 1962 not in the public service as that term is defined in Section 1 (1), in that he is not in "the service of the Crown in respect of the Government of Jamaica."

The Opposition Leader is, appointed by the Governor General as "the member of the House of Representatives, who, in his judgment, is best able to command the support of a majority of those members, who do not support the government" (S.80 (1) of the Constitution).

The responsibilities given to the Leader of the Opposition by the Constitution are consultative in nature. He is to be consulted by the Prime Minister and thereafter the Governor General in the appointment to, and removal from office, of members of several of the other constitutionally enshrined posts, including the members of the Police Services Commission (Section 129 of the Constitution). I have made specific mention of this Commission because it is charged by the Constitution with the responsibility of advising the Governor General as to the appointment to, and the removal

from office of any police officer (Sections 125 & 130). Authority has been given for the delegation of the duty to appoint and remove but that authority is not relevant for these purposes as that delegation only concerns the rank of Inspector of Police and those below that rank (Section 131).

In this context of the status of the office of the Leader of the Opposition, the words of Dr. Lloyd Barnett O.J. in his work "*The Constitutional Law of Jamaica*" are apposite. The learned author, at pp. 113-4 of that work said: -

> "The important provision relating to consultation with the Leader of the Opposition before appointments to the Commission are made was intended to demonstrate that the appointment should be free of political partisanship, to allay fears that politicians may exercise undue influence over public officers, and to provide a means by which the Leader of the Opposition would be able to make a public protest against any appointment which he regarded as improper.... Probably the device is of greatest value as a deterrent against improper appointments as public protest may lead to official anxiety and public criticism."

Mr. Seaga has pleaded and has testified that he had spoken the subject words out of a duty to inform the public "of (his) fears" about Mr. Harper, "and (that he) had every reason to believe that the people of this country were interested in receiving that information" (paragraph 9 of his witness statement).

Mr. George, in supporting Mr. Seaga's stance submitted that it was the duty of the Opposition Leader to examine the Government's proposals and policies and when necessary criticize them, demand explanations and air public grievances.

He summarizes the duty thus:

> "In other words (the Opposition) are to be vigilant in the public interest for the good government of Jamaica."

Lord Gifford, Q.C. in reply accepted that the Leader of the Opposition had a duty to be vigilant in the matter of the policing of Jamaica.

Based on the above assessment I accept the submissions of both Counsel that the Leader of the Opposition has a duty to inform the public of any Governmental proposals, which he opposes, and the reasons for his stance.

The interest of the Jamaica public in receiving the concerns of the Leader of the Opposition

Both learned Queen's Counsel have submitted, and I accept it as being obvious, that the people of Jamaica have an interest in the conduct of the police force and the propriety of its leadership. In his opening Mr. George has exemplified the basis of the interest thus:

> "The Court sits by grace of God and the protection of the police, and so do we all."

I therefore find that the Jamaican public does have an interest in being told of any development or situation, which could or does affect the ability of the police force and its leadership to carry out its mandate to the Jamaican society.

In deference to the industry of counsel for Mr. Seaga I shall cite the case of *The Gleaner Company Ltd and Sibblies v Smart* (1990) 27 JLR 577 heard in the Court of Appeal. Rowe J.A. (as he then was) at p 584 E stated that interest thus:

> "If there are corrupt policemen who are undermining the safety of the nation...the public has an absolute right to know who they are. How can the members of the public protect themselves from such vile traitors, if any there be, if their identity (sic) remain secret?"

The learned Judge of Appeal was then speaking in the context of policemen allegedly conspiring with criminal gunmen. Though the present allegations are different I find that the principle enunciated by that learned Judge of Appeal remains appropriate to this case, and it would equally apply to politically biased senior police officers.

I now turn to the content of the subject matter of Mr. Seaga's publication to determine if it fits into the occasion of qualified privilege.

Did Mr. Seaga have a duty to speak the words in these circumstances?

In assessing the court on the issue as to whether the occasion was one of qualified privilege Lord Gifford submitted that the test is "whether the Leader of the Opposition had the duty to speak in the circumstances of this case and in particular whether he had a duty to speak to the public in the language he used, based on the state of the knowledge which he then had and without making further enquiry of anyone".

I accept this as an accurate synopsis of the essence of the issue. Although it is concisely stated it does have a number of aspects.

The scenario in which Mr. Seaga made his comments, that is, at a hotel, at a meeting open to the public and attended by the news media raises the question of the type of publication that it was. It is my view that in this context the publication is to the world at large. The national coverage afforded by media with island-wide circulation takes the occasion of this communication out of the realm of communication between persons in a specific relationship.

Mr. Seaga was no longer speaking just to members of his party or to members of the public who had attended the meeting; he was addressing through the media, at least an island-wide audience.

In this context it may be that a special approach is required (see *Kearns & others v General Council of the Bar* [2003] 2 ALL ER 534. This approach is outlined in the case of *Reynolds vs. Times Newspaper Ltd.* [1999] 4 ALL ER 609.

The *Reynolds* case dealt with a publication by a newspaper. In the *Kearns* case Simon Brown L.J. at p 536 asserted that the *Reynolds* case applies only to media publications. I find however, that the *Reynolds* case does apply to the instant case bearing in mind the presence in the audience of the media and Mr. Seaga's realized expectation that his utterances were more than likely to be quoted to the public by the media.

In *Reynolds* the House of Lords expressly rejected the concept that 'political information' should be recognized as a "new subject matter category of qualified privilege, whatever the circumstances". Mr. Seaga's speech therefore does not automatically receive any protection by virtue of his position or by virtue of the subject matter.

Lord Nicholls at p 626 of the report in *Reynolds*, expressed the view that when considering whether qualified privilege attached to expressions by the media, the matters to be taken into account included the following:

(1) The seriousness of the allegation.

(2) The nature of the information, and the extent to which the subject matter is a matter of public concern.

(3) The source of the information.

(4) The steps taken to verify the information.

(5) The status of the information.

(6) The urgency of the matter.

(7) Whether comment was sought from the plaintiff.

(8) Whether the article contained the gist of the plaintiff's side of the story.

(9) The tone of the article.

(10) The circumstances of the publication, including the timing.

This list was cited with approval by Forte P. in our Court of Appeal in the case of _Margaret Morris vs. Hugh Bonnick_ *S.C.C.A* 21/98 (delivered April 14, 2000), at p 13 of the unreported judgment.

I shall now examine the circumstances of this publication in the context of the guidelines of that list. It is to be noted that Mr. Seaga was the sole witness for the defence in this case.

(1) The seriousness of the allegation

I have already dealt with this area and expressed the view that the allegation was an extremely serious one against a senior police officer.

(2) The nature of the information and the extent to which the subject matter is of public concern

Mr. George submitted that what was communicated by Mr. Seaga was information about a development which "could lead to the appointment to (the) sensitive post of Commissioner of Police, a person who held strong political views and was a political activist who could use his bias to the disadvantage of the Police force and indeed of the country."

I do not accept the submission as valid for two reasons. Firstly, in my view the evidence as adduced does not show that there was any "development". Mr. Harper accepted that he did hear outside of official circles that he was being considered for the post of Commissioner. His words were: "one or two persons might have told me so but my response would have been that nobody in authority was telling me that." He also accepted that other persons could have been told that he was being so considered. Mr. George then asked a question, which I consider significantly classifies the nature of the information.

> "So it wouldn't surprise you that that rumour or bit of news would reach the ears of Mr. Seaga?"

Mr. Harper answered that he wouldn't be surprised. Mr. Harper also admitted seeing a newspaper article appearing in the March 14, 1996 edition

of the Gleaner Newspaper. That article spoke to several issues but the main ones were:

(a) the question of whether Col. McMillan would be asked to continue in the post of Commissioner,

(b) whether the Ministry of National Security and Justice supported Mr. Harper to be the new Commissioner, and

(c) whether Mr. Harper had requested the support of the Police Federation for his candidacy for the post of Commissioner.

The article was one of many newspaper articles shown to Mr. Harper during cross-examination. It must be borne in mind that this particular article appeared after Mr. Seaga had made the speech containing the words that are the subject of this action. There is nothing in this article concerning the post of Commissioner becoming vacant or in respect of succession by Mr. Harper, which rises above the level of rumour. The balanced style used in the article revealed that each allegation about Mr. Harper had been denied by an official source.

Mr. Seaga's evidence on the point was this:

"In the period approaching March 1996 when it was in circulation that the then Police Commissioner was having difficulty with the Minister of Justice and that Mr. Harper

would have succeeded him, many people called me and warned me to be careful and asked me not to give my consent and reiterated that this supporter to the People National Party would result in the return to conditions of the former Police Commissioner Roy Thompson."

He disclosed no names but asserted that among his informants were some influential people. What is clear is that there was no official source providing that information.

Secondly, the nature of the information about Mr. Harper's alleged bias was from no official source. Mr. Seaga testified that the information came to him from several persons. Firstly he says that the information came, on many occasions, from the former Opposition Spokesman on National Security. Secondly, it came from the current Opposition Spokesman on National Security and thirdly, from the current chairman of the Jamaica Labour Party. In addition to those sources, he heard from people whom he would meet and persons whom he had "asked to check out the conduct of Mr. Harper."

None of Mr. Seaga's allegations against Mr. Harper resulted from his personal observation. He further testified that the persons who gave him information about Mr. Harper's conduct were relaying what was told to

them by other persons. Some of those other persons he says would have been police officers. He says that he believed such police officers would have been of very high rank. His belief was based on the fact that his informants were persons who were "accustomed to speaking to persons of very high rank in the police force, not lower rank." He did not ask for the ranks of those police officers.

Does this information as brought to Mr. Seaga rise above mere rumour? I am of the view that it does not.

(3) The source of the information

Mr. Seaga was careful to emphasize that the informants upon whom he relied were all responsible persons. Not only did they include the persons having direct oversight for his party of matters relating to the police force but also included were some whom he described as "influential people."

Mr. Seaga at one point in cross-examination did say that his informants "were telling me what other persons said to them and what they observed themselves". He however asked none of his informants for an instance of political bias in Mr. Harper. He says that he asked them only for their findings based on the information they had. I cannot accept that these persons were basing their respective conclusions on personal observation without revealing any instance of what they had each observed.

His informants included colleagues in his party as well as persons whose political affiliations he did not know. Mr. Seaga did not ask any of his informants about the identity of any of the persons passing on the information.

Lord Nicholls in his explanation for the need to query the source of the information being received, said this at p. 626 (b) of Reynolds (*supra*):

> "Some informants have no direct knowledge of the events. Some have their own axes to grind."

I find as a fact that Mr. Seaga was unaware of the source of the information being passed on to him through his informants and similarly the court is prevented by that lack of knowledge from determining whether these were reliable sources or not.

(4) The steps taken to verify the information.

Mr. Seaga's answers in cross-examination concerning the steps he took to verify the information being communicated to him are instructive.

In respect of members of his party Mr. Seaga said, "I believed what my colleagues told me."

When asked if he didn't think it appropriate to ask for an instance of Mr. Harper's bias, Mr. Seaga said: -

> "The persons who hold positions to which I appoint them are persons accustomed to giving me

> information which is correct. I do not seek to go beyond their findings, it would be inappropriate."

When asked if any of his informants told him the names of the police officers from whom they received the information, Mr. Seaga said: -

> "It would not be appropriate for me to question them as to who gave the information, I have confidence in them and I accepted their word."

When asked if he sought to speak to any of the police officers from whom his informants had derived their information, Mr. Seaga's answer was:

> "It would be inappropriate and insulting to go behind my colleagues. I believed what they said. Time has proved me (correct) in my trust."

These answers show that Mr. Seaga took no steps to verify the information being brought to his attention about Mr. Harper. He sought no instance to demonstrate the bias of which his informants were accusing Mr. Harper. He was content to rely on the conclusions of his informants on the basis that they were responsible persons, and, extrapolating from the mention of the Opposition Spokesmen, that some were actually charged with monitoring matters of the nature involving the integrity of the police force.

I have found that Mr. Seaga was at that meeting, in a position akin to a publisher of news, but is he in fact different from a reporter who has to verify his sources? Is he entitled to rely on the conclusions of "responsible people"?

It would be, in my view unreasonable to expect him to ask for verification of details of every conclusion brought to his attention as the Leader of the Opposition and the leader of a major political party, with all the activity, need for delegation, and management skills which such a position must demand. I am however of the view that merely to rely on the conclusions of the thought processes of other people without even one instance by way of demonstrating the validity of those conclusions, is inadequate at best.

(5) The status of the information

The example given by Lord Nicholls in this category at p 626 of *Reynolds* (*supra*) is that the "allegation may have already been the subject of an investigation which commands respect." Prior to Mr. Seaga's speech, there is no evidence of any official investigation into such an allegation against Mr. Harper, but the machinery existed for such an investigation to be conducted. That machinery would be under the auspices of the Police Services Commission or the Commissioner of Police.

Mr. Seaga testified that he had very little respect for that Commission. He said that by 1996 his party had "no faith in the Police Services Commission." There was a view, he said, that the Commission had itself shown political bias in the matters of promotions and disciplinary action.

Mr. Seaga expressed confidence in the professionalism of Col. McMillan, the then Commissioner of Police, but thought it inappropriate to ask the Commissioner about Mr. Harper's alleged bias. He certainly did not complain to Col. McMillan about that bias.

The status of the information in my view does not sway the matter one way or the other.

(6) The urgency of the matter

There is no evidence to suggest that there was an urgency to provide the information to the Jamaican public, which precluded lodging his complaints through the appropriate channels.

The background to the scenario was the expiry of Col. McMillan's contract, but that was scheduled for some three months after the time that the speech was made.

Mr. Seaga's attitude however, is that there was no point in lodging those complaints because the machinery for treating with them (i.e. the Police Services Commission) was tainted.

As I have previously stated there was no official announcement or proposal that Mr. Harper was to have been appointed, or was being considered for appointment, to the post of Commissioner of Police. There is no evidence that Mr. Seaga could not have aired his concern in Parliament

where such a pronouncement would have had the benefit of being officially noted, had an equal chance of national exposure and, of course, the absolute privilege afforded statements made in that honourable House.

I have mentioned Parliament because there is an instance cited in Dr. Barnett's work (*supra*) at p. 114 about a disagreement between the Prime Minister in 1963 and the then Leader of the Opposition over the appointment of an individual to the Public Services Commission. The Leader of the Opposition was objecting to the appointment on the basis of the individual being politically biased. Dr. Barnett relates that it was handled thus:

> "In the House of Representatives the Leader of the Opposition on a motion for the adjournment renewed his protests and the Prime Minister not only denied that Dr. Beckford had ever been a member of his Party but ..."

This example demonstrates that Mr. Seaga had other options to bring his complaint to the attention of the Jamaican public. There is no evidence that demonstrates to me that the issue was so urgent that the matter could not await a sitting of the House of Representatives, since Mr. Seaga was uncomfortable with the other official channels.

(7) Whether comment was sought from the Plaintiff.

Mr. Seaga dismissed as "fanciful" the query as to whether he ought not to have asked Mr. Harper about the allegations against him.

Lord Nicholls in his speech has pointed out that an approach to the plaintiff will not always be necessary. He did however explain that seeking the plaintiff's comment might reveal information which "others do not possess or have not disclosed".

I am of the view that it would be naïve for Mr. Seaga to have enquired of Mr. Harper if he were politically biased toward the P.N.P., or whether he was a P.N.P. activist. It perhaps would not be fanciful if specific instances were to have been put to Mr. Harper to determine what was his explanation for that which Mr. Seaga had perceived as an instance of political bias. Mr. Seaga however, as has been observed above, knew of no such instance.

(8) Whether the article contained the gist of the plaintiff's side of the story.

Since no enquiry was made of Mr. Harper, Mr. Seaga clearly could not comment as to what was Mr. Harper's view on the charges being laid against him. It is useful to note that the failure to secure the plaintiff's view on allegations being made against him was a critical factor that the House of Lords used in ruling in favour of the plaintiff in the *Reynolds* case. The newspaper in that case had failed to publish Mr. Reynolds' explanation on

the point being examined in its article and as a result the House of Lords found that the article was misleading.

Lord Nicholls summarized it thus at p. 627 e:

"Was the information in the Sunday Times article information the public was entitled to know? The subject matter was undoubtedly of public concern in this country. However, these serious allegations by the newspaper, presented as statements of fact but shorn of all mention of Mr. Reynolds' considered explanation, were not information the public had a right to know."

In applying this principle I can find no distinction between Mr. Seaga's communication and that of the newspaper publisher in the *Reynolds* case.

(9) The tone of the article.

During cross-examination Lord Gifford sought to have Mr. Seaga agree that one can raise concerns in different ways. One such way, suggested Lord Gifford, was to state things as allegations and to ask for investigation. In this context Mr. Seaga testified that the way he chose was "to raise concerns by stating things as a fact and asking people to agree". He said he used this route because he believed the information given to him.

(10) The circumstances of the publication, including the timing.

There can be no doubt that the context of the meeting; the presence of the public media and the fact that the issue of Col. McMillan's contract was coming to an end gave potentially significant impact to Mr. Seaga's speech. I am not prepared to say however that there was any malice involved in the timing or method of communication, and indeed Mr. Harper has not pleaded any such factor.

Conclusion on Liability

Based on my findings above, I find that the occasion, on which Mr. Seaga made his comments about Mr. Harper, was not one of qualified privilege.

I have reasoned the issues on the basis that this was a case akin to publication by a newspaper such as in the ***Reynolds*** case. I recognize that the situations are not identical, but as I have already stated, my view is that they are materially indistinguishable.

In the event that I am wrong in that premise, I am still of the view, based on the facts as I have found them, that the "information" did not rise above the level of rumour and so there was no duty to report those allegations to the Jamaican public at the time which Mr. Seaga did so, and,

those allegations, to quote the word of Lord Nicholls above; "were not information the public had a right to know."

Even if this was not an occasion requiring a *Reynolds* privilege type of assessment I find that this was not an occasion of qualified privilege. I draw support from the case of *De Buse v McCarty* [1942] 1 All E.R. 19. Simon Brown LJ in the *Kearns* case (supra), at p 548, summarized the facts of the *De Buse* case thus:

> "The facts were that the defendant town clerk had sent out a notice convening a meeting of the borough council to consider a committee report about the loss of petrol from one of the council's depots. The report was attached to the notice which was posted at the town hall and in public libraries. The plaintiffs complained that the report was defamatory of them. The defendants pleaded that the publication was made on a privileged occasion on the ground that there was a common interest between the council and the ratepayers in the subject matter of the words complained of."

The English Court of Appeal held that the defence failed. Lord Greene MR. said at p. 23:

"there could be no common interest, as far as I can see, between the council and the ratepayers to have what, in the circumstances, was only a preliminary stage in the investigation communicated to the ratepayers in the form in which it was communicated"

I draw a parallel between the *De Buse* situation and the instant case. Here there was no official investigation at all concerning Mr. Harper's alleged bias, neither was there was an official pronouncement of his being considered for appointment as Commissioner; all that existed, based on Mr. Seaga's evidence, was rumour on both issues.

The case of *Pittard v Oliver* [1891] 1 LR QBD 474, does have a sufficient similarity to the instant case to warrant mention. The head note of that case states as follows:

"At a meeting of a board of guardians, of which the plaintiff had been the clerk, the defendant, a member of the board, in the course of a discussion concerning the plaintiff's accounts made certain defamatory statements concerning the plaintiff, without malice and *bona fide* believing that what he said was true. In accordance with the regular custom of the board, reporters were present at the meeting: -

> *Held*, that the privilege which would have attached to the statements, if made in the presence of the guardians only, was not taken away by the presence at the meeting of reporters or persons other than guardians."

Lord Esher M.R. at p 478, after accepting that the defendant had a duty to express his opinion at the meeting found that the defendant had not invited the reporters, he was not in a position to ask them to leave and he could not prevent their being present. In these circumstances the learned Master of the Rolls concluded that the privilege afforded the occasion "was not taken away by the presence of (the reporters)".

The meeting in that case is not materially similar to Mr. Seaga's meeting. I have found that the occasion was not privileged because of the nature of the information communicated and so even if the media had not been present the words would nonetheless have been slanderous.

I therefore find in favour of Mr. Harper on the question of liability. I shall now look at what was the loss to Mr. Harper and what quantum of damages ought to be awarded to him as a result.

Damages to be awarded

In his statement of claim Mr. Harper pleaded that he has been "seriously injured in his character, credit and reputation, and in particular his

chances of being appointed to the office of Commissioner of Police, or other high office in the police service, whether in Jamaica or abroad, have been seriously prejudiced". Mr. Harper in his witness statement testified that, "the allegation has caused me severe embarrassment and distress. I found the allegation wounding". Apart from that statement there is no evidence from Mr. Harper of there being any adverse effect on him as a result of the statement by Mr. Seaga.

One of Mr. Harper's witnesses gave evidence as to the effect which the publication of the words by Mr. Seaga. Mr. Lloyd Martin testified in his witness statement that, "As a consequence of what I heard I felt embarrassed and ashamed of being a friend of Mr. Harper as I felt that someone in the position of the Leader of the Opposition would have based such accusations on facts gleaned from investigation or enquiry into the conduct of Mr. Harper." Mr. Martin went on to say that based on the allegations he felt Mr. Harper unsuitable to fill the post of Commissioner of Police. He also said, "I avoided Mr. Harper until sometime after I realized he was seriously challenging the allegations made against him."

Lord Gifford has cited for guidance the fairly recent judgment of the Judicial Committee of the Privy Council in the case of _The Gleaner Co. Ltd and another v Abrahams_ PC App. 86/2001 delivered 14/7/2003 in which

their Lordships ruled that $35,000,000.00 awarded to the plaintiff Abrahams for a libel against him was not excessive. Mr. George has submitted that the *Abrahams* case is dissimilar to this one in the evidence that was presented. In the *Abrahams* case the plaintiff provided substantial evidence of the loss he suffered, financially, physiologically, mentally and socially. He called witnesses to show how the effect showed on him physically. Mr. Harper has shown nothing of the sort. I accept that the *Abrahams* case does not assist the court in respect of the quantum of the award.

In the case of *Woman Corporal Jacqulin "Maxine" Kennedy v The Gleaner Co. Ltd.* C.L. 1995/K030 delivered 27/4/2001, a corporal of police was defamed in her personal capacity by a newspaper report. In that case Dukharan J. found however that as a result of the defamation she was removed from active duty, given static duty and was by-passed for promotion. The court awarded her $750,000.00. That sum included an award for aggravated damages.

In order to provide adequate compensation to Mr. Harper I must take into account his status as a Deputy Commissioner of Police at the time. Certainly that status will deserve his being awarded a much higher figure than was Corporal Kennedy. He was defamed in respect of his public office while she was not. My earlier comments concerning the need for police

officers to appear to be impartial and Rowe JA.'s comments (cited earlier) concerning the character of police officers betraying their trust cannot be considered unique opinions. Mr. Seaga's allegations, I find, must have affected Mr. Harper's status in the eyes of well thinking persons in the society, such as Mr. Martin, as well as members of the police force. Whether it affected his being appointed Commissioner of Police (either here or abroad) would be pure speculation, as understandably in the local context, there was no evidence on the point. Mr. Harper's thirty-four years of service in the force must also be considered as a factor in determining the quantum of damages.

The fact that Mr. Harper has since left the force and is now practicing as an Attorney-at-law would have to be taken into account in reducing the compensation that would be appropriate in securing the re-establishment of his reputation. There is now no need for any appearance of impartiality on his part.

Mr. Harper was treated to cross-examination in which there were suggestions made to him repeating the substance of the allegations that Mr. Seaga made in his offending speech. Mr. Harper's credibility and that of his witnesses was severely challenged as to whether he was politically biased. That challenge, was in my view, unnecessary in light of the defence pleaded,

namely that of qualified privilege. It was not a defence of justification that was pleaded. That approach, I find, serves to add to the sting that the original publication would have had. Perhaps its effect would be lessened now in light of Mr. Harper's changed status but I am of the view that it should affect the damages awarded. If the aim of the tenor of the cross-examination was to reduce the level of the damages to be awarded, I find that it did not succeed.

I find that Mr. Harper is entitled to aggravated damages based on the extent of the publicity given to the speech, the effect that it would have had then on the members of the public and Mr. Harper's colleagues in the police force and also based on the conduct of the defence in the case.

Conclusion

The assessment of the balance of the competing interests in this case has resulted in my view in a tip in favour of Mr. Harper. I find that Mr. Seaga did not succeed in showing that the occasion was one that entitled him to disparage Mr. Harper's character as a Deputy Commissioner of Police. As a result of his senior rank at the time and the nature of what was said about him I find that Mr. Harper would have been reduced in the eyes of right thinking people and particularly persons in the police force at the time.

Mr. Harper should be compensated for this injury to his reputation. He has however produced very little by way of proof of this loss.

Bearing in mind the publicity given to the speech, as well as the way in which the defence was conducted, I believe Mr. Harper is entitled to aggravated damages, which I shall include as part of the award.

Taking into account all the factors mentioned above judgment is hereby awarded in favour of Mr. Harper in the sum of $3,500,000.00. He is also entitled to his costs of the action to be taxed if not agreed.