REPORTABLE (14)

Judgment No. S.C. 35/98
Crim. Application No. 687/97

CANAAN SODINDO BANANA v THE ATTORNEY-GENERAL

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA, EBRAHIM JA, MUCHECHETERE JA &
SANDURA AJA
HARARE, MARCH 6 & 26, 1998

J C Andersen SC, for the appellant

A V M Chikumira, for the respondent

GUBBAY CJ: This Court is confronted for the first time with the contention that widespread pre-trial publicity adverse and hostile to an accused person may so indelibly prejudice the minds of the judge and assessors at the criminal trial as to negate the constitutional protection of a fair hearing before an independent and impartial court.

THE BACKGROUND FACTS

With the advent of independence on 18 April 1980, the applicant was appointed the country's non-executive President. He remained in that office until the end of 1987. He is an acclaimed academic and minister of the Methodist Church, who was an honorary professor and lecturer in religious studies, classics and philosophy at the University of Zimbabwe. In 1989 the applicant served as a member of the United Nations Commission of eminent churchmen mandated to investigate

multinational activities in South Africa. And in 1996 he was named as the Organisation of African Unity's special envoy to mediate an end to civil wars raging in Liberia and Sierra Leone. It is apparent that by virtue of his position in society and international standing, the applicant is a newsworthy personality both within and outside the borders of Zimbabwe.

On 24 February 1997 Jefta Dube, a former police inspector who had served as the applicant's aide-de-camp, was convicted by the High Court of having murdered a police constable. After a finding of extenuating circumstances was made, Dube was sentenced to undergo ten years' imprisonment with labour. The court accepted that when committing the crime Dube was suffering from diminished responsibility brought about by drink and stress. It held that it could not reject as false the uncontroverted claim that he had been traumatised as a result of being the victim of repeated homosexual abuse by the applicant, at State House, during the years 1983 to 1986. The presiding judge recommended that a full investigation be instituted through the Attorney-General's Office and the police to establish the veracity of Dube's claims of sexual abuse. The judgment, now reported as *S v Dube* 1997 (1) ZLR 229 (H) was given extensive prominence by the media.

The next day the Commissioner of Police announced that the allegations of sodomy against the applicant were to be investigated immediately.

On 7 July 1997 the applicant was indicted to the High Court for trial on two counts of sodomy, three counts of attempted sodomy and six counts of indecent assault. The offences were stated to have been committed during the period

extending from 1 January 1980 to 31 December 1996. The applicant was remanded on bail to appear before the High Court on 4 August 1997. The date of trial was later altered by consent to 22 September 1997.

THE PROCEEDINGS BEFORE THE HIGH COURT

At the inception of the trial presided over by BLACKIE J and two assessors, counsel for the applicant moved an application for a permanent stay of proceedings. The grounds advanced were that there was a real risk that the applicant would not receive a fair trial in consequence of both the pre-trial publicity to which he had been subjected and statements as to inadmissible evidence set out in the outline of the State case. In the event of the refusal of that form of relief, an order was sought directing the Attorney-General to furnish the applicant with the investigation diary contained in the police docket. It was submitted that both applications were based on the provisions of s 18(2) of the Constitution of Zimbabwe, which guarantees the right of any person charged with a criminal offence to be afforded a fair hearing before an independent and impartial court established by law; the High Court having jurisdiction to entertain the applications in terms of s 24(4) of the Constitution. It was further submitted that under the common law the High Court had inherent power to stop a prosecution which creates unfairness, injustice and an abuse of its process. That this is so has been recognised by other courts whose decisions are persuasive. See *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL) at 1301, 1347 and 1365; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Director of Public Prosecutions* [1992] 95 Cr. App. R. 9 (QBD) at 16; *Bennett v Horseferry Road Magistrates Court and Anor* [1993] 3 All ER 138 (HL) at 156 f-h; *Jago v The District Court of New South Wales and Ors* (1989-1990) 168 CLR 23 (High Court of

Australia) at 26, 29, 53, 56 and 75; *Moevao v Department of Labour* (1980) 1 NZLR 464 (Court of Appeal of New Zealand) at 482; *R v Jewitt* (1985) 2 SCR 128 (Supreme Court of Canada) at 136-137; *The Queen v William Hung* (1994) 1 HKCLR 50 (Court of Appeal of Hong Kong) at 56; *Klein v Attorney-General, Witwatersrand Local Division and Anor* 1995 (3) SA 848 (WLD) at 855 I-J.

The Director of Public Prosecutions opposed the applications on their merits. He did not suggest that the High Court should have recourse to s 24(2) of the Constitution and refer to the Supreme Court the questions arising as to the alleged contraventions of s 18(2). Nonetheless the learned trial judge, in the exercise of his discretion, resolved to refer the questions, which were neither frivolous nor vexatious. He reasoned that it was undesirable for a judge and assessors to determine whether the magnitude of the pre-trial publicity, and the impugned allegations in the outline of the State case, were so adverse to the applicant as to create a real risk of the members of the court being unable to try him with impartiality.

With due deference I consider that the trial court was better placed to decide the principal question than is the Supreme Court. Certainly that was the view taken by the Privy Council in *Boodram (also called Dole Chadee) v Attorney General* [1996] 2 LRC 196, an appeal from the Court of Appeal of Trinidad and Tobago. LORD MUSTILL, on behalf of the Board, observed, at 206 h-I, that the proper forum for a complaint about pre-trial publicity in pending criminal proceedings was the trial court, where the judge can assess the circumstances which exist and decide whether the available procedures are sufficient to enable the jury to reach its verdict with an unclouded mind; or whether, exceptionally, a temporary or even permanent stay of

the prosecution was the only solution. See also the *dicta* of CORY J in *Phillips v Nova Scotia* [1995] 28 CRR 1 (Supreme Court of Canada) at 36.

THE MAIN ISSUE

(1) The attitude of the Director Of Public Prosecutions

Before this Court the Director of Public Prosecutions acknowledged that the outline of the State case, which had been served upon the applicant and lodged with the Registrar of the High Court in terms of s 110(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], contained matter either actually or debatably prejudicial to the applicant. He correctly pointed out, however, that as the applicant had not pleaded to the charges, the outline, though seen by the trial judge and his assessors, had not been formally produced and read out in open court. Thus the media had been denied access to it. He undertook to withdraw the offending outline and replace it with another which, he said, would be confined to the evidence the State intended to adduce in respect of each of the eleven charges, without any suggestion of the applicant's propensity.

Appreciating that if a stay of proceedings were refused it was likely that there would be a change of judge and assessors, Mr *Andersen*, who appeared for the applicant, was content to forego any reliance upon the outline of the State case. But he argued with much force that the impact of the improper allegations by the print media was so prejudicial to the applicant as to create a real risk that any court trying him would be bound to be adversely affected.

(2) The political tension between the right of the press to freedom of expression in the conveyance of information to the public and the right of an accused person to a fair hearing

One of the crucial elements of a fair hearing is the right to be tried solely on the evidence before the court, and not on any information received outside that context. Section 18(2), as read with s 18(3), of the Constitution entrenches the right of any person charged with an offence to a fair hearing and to be presumed innocent until proved guilty. The fairness and impartiality of the criminal process is the cornerstone of the legal system. In protecting the fairness of the trial, both under the Constitution and at common law, it is to be accepted that the potential for prejudice relates not only to the accused but to society in general.

Freedom of expression, as this Court has reiterated, is a right and enjoyment always to be jealously guarded. It is recognised as a core value of society, essential to truth, democracy and personal fulfilment. See *Retrofit (Pvt) Ltd v PTC and Anor* 1995 (2) ZLR 199 (S) at 211 A-H, 1995 (9) BCLR 1262 (ZS) at 1271F-1272C; *The United Parties v Minister of Justice, Legal and Parliamentary Affairs and Ors* S-139-97 (not yet reported) at p 20.

Freedom of the press, which is encapsulated within the provisions of s 20(1) of the Constitution, is also crucial to the public nature of the administration of justice and the potential for scrutiny that comes with such openness. Prosecutions, and judgments and sentences of the courts, have always been matters of legitimate public interest. In many cases the press renders great service by the publication of reports of events surrounding the commission of a crime or an alleged crime, and it is

no function of the courts to act as censors. The people have a right to know. Yet occasionally restrictions will be necessary and acceptable in a free and democratic society. Freedom of expression and of the press are not conferred in absolute terms. They carry with them the quality of restraint. In the context of legal proceedings such freedom must be exercised reasonably, especially where the person targeted is awaiting trial on a criminal charge. What always has to be balanced is the right of the public to information and of the media to report and express views freely, against the right of an accused person to a fair trial. To be avoided is a situation in which media coverage adversely influences or trespasses upon the proceedings, or the judicial officer trying them.

On a hierarchy of constitutional rights there can be no doubt that the right to receive a fair trial, which is the central precept of our criminal law, must be given priority over freedom of the press. See the decisions of the Ontario Courts in *Steiner v Toronto Star Ltd, et al* (1956) OR 14 at 17; *R v Begley, et al* (1982) 2 CRR 50 at 53; and also, *Dagenais v Canadian Broadcasting Corporation* (1995) 25 CRR 1 (Supreme Court of Canada) at 13.

In *D v Director of Public Prosecutions* [1994] 2 IR 465 (Supreme Court of Ireland) FINLAY CJ sounded this caution at 468:-

> "Even though it is clear that in the interests of justice much greater vigilance should be shown by newspapers in the type of publicity which they give to crimes in which trials are still pending, it is not to be taken that every criminal trial in respect of an offence which has received significant publicity will by that fact become an unfair trial. If a contrary view were taken, the administration of the criminal law in notorious cases could be brought to a halt by adverse media publicity."

While accepting the good sense of these remarks, it cannot be gainsaid that media reporting of a judicial process, or in advance of it, may, in exceptional circumstances, be so irresponsible and prejudicial as to make the unfairness irreparable and the administration of justice impossible. If that were to occur then there is, quite literally, nowhere to go. The court will have no option but to grant a stay of proceedings; for it is more important to retain the integrity of the system of justice than to ensure the punishment of even the vilest offender. See, for instance, *R v McCann and Ors* (1991) 92 Cr. App. R. 239 (CA) at 253; *R v Reade, Morris and Woodwis*, unreported judgment of GARLAND J delivered at the Central Criminal Court, London, on 15 October 1993; *R v Taylor and Taylor* [1994] 98 Cr. App. R. 361 (CA) at 369; *R v Knights*, unreported judgment of the Crown Court, at Harrow, dated 3 October 1995.

(3) The publications and their overall effect

The applicant placed before the trial court a series of articles about him which appeared in the press very shortly after the *Dube* judgment was published. These articles were written in the knowledge of the assurance given by the Commissioner of Police that investigations into sodomy allegations levelled against the applicant were to commence forthwith. I shall refer only to the leading articles.

On 28 February 1997 the front page of the weekly *Zimbabwe Independent* carried the sensationalised heading "Banana sex scandal balloons". This plainly inferred that the applicant's homosexual activities went far beyond those acts he was alleged to have committed upon Dube. The article was extremely long continuing on page two. It dealt in detail with the testimony of Dube. It quoted

General Solomon Mujuru as saying that during the period of the applicant's presidency, troops stationed at State House had to be withdrawn in order to prevent them from being abused; the implication being that the applicant posed a sexual threat to the troops. An editorial comment in the same issue of the paper was entitled "Chickens coming home to roost". It suggested that Dube's complaint "might just have opened a can of worms" and referred to reports of Banana's rampant sexual urges being received as early as 1981. Since *Dube's* assertions of sexual abuse by the applicant, as reported in the judgment, occurred between 1983 and 1986, it must have been obvious to readers that other incidents were being alluded to.

The April 1997 issue of the magazine *Parade* contained an article which bore the heading "Allegations against Canaan Banana shock churches", with the subheading "But insiders say reports had been rife for a long time". The first column offered this comment:-

> "Political observers and the public at large were also horrified by the allegations although many said Banana's homosexual activities had become a public secret many years ago but no-one dared bring it out."

Perhaps the most offensive article was that which appeared in the *Financial Gazette* of 8 May 1997. It was entitled "Fresh allegations against Banana" and was followed by a subheading which read "Dozens flood police investigators with new charges". The first paragraph, in bold print, claimed that dozens of current and former students at the University, soccer players and members of the security forces had "trooped before a panel of police investigators to level new allegations of homosexuality" against the applicant. The article went on to mention "the sudden stampede to file fresh charges", and that the investigators had isolated eight cases so

far – the sting being that there were many more. It related that the police had interviewed powerful personalities, such as Vice-President Muzenda, the Minister of Justice, the former Chief of the Army and Police Commissioner, which gave rise to a perception that the complaints of sexual harassment were true.

In the *Financial Gazette* of the following week it was stated that more people were coming forward to give testimonials and present new sex charges against the applicant.

On 12 June 1997 it was again recounted by the press that the police were being flooded with complaints. "Dozens of former University of Zimbabwe students, footballers and security personnel are said to have come forward to report that Banana had at one time or another allegedly raped, sodomised or sexually abused them. All the complainants are said to be men".

A week later the Director of Public Prosecutions was reported as saying that he was constantly working with the police on the case in order to plug any loopholes that might frustrate any possible prosecution. "We want to put lock and key onto the case" (an unhappy turn of phrase). This quote followed the information that the Attorney-General's Office was assessing an assortment of sodomy and homosexual charges against the applicant. All this conveyed to the ordinary reader that the conviction of the applicant was assured.

Finally, the *Financial Gazette* of 26 June 1997 announced that nine concrete complaints had been identified by the police who said that, these apart,

"dozens of other people have come forward alleging that Banana abused them, their friends or relatives".

Information that the University had "fired" the applicant and that he had been "stripped of his rôle as the OAU's special envoy to Liberia", was also published.

Amidst this extensive publicity, the applicant broke his silence on 19 June 1997 in an interview with the *Zimbabwe Independent*. He described the allegations as "a mortuary of pathological lies, a malicious vendetta of vilification and character assassination – the biggest joke in living memory, absolutely laughable".

To some extent these protestations of innocence may have neutralised the antagonistic and prejudicial pre-trial press coverage to which the applicant was subjected. Nonetheless I am persuaded to accept the argument that the cumulative effect of the publicity was to induce a belief that the applicant has a propensity to homosexuality and was guilty not only of the charges for which he was to be prosecuted but many other similar offences besides.

It is true that the applicant possesses a marked degree of notoriety. He is an extremely newsworthy person, a prominent leader in society against whom the commission of grave crimes is alleged. As such the media had every right to report on matters of public interest and concern. This is a feature of modern times. Inevitably, therefore, the applicant had to succumb to greater coverage than those individuals who are less well known, or whose cases are not as serious. Yet even so, the impugned articles, to my mind, represent a marked departure from the standard of

fair, temperate and unbiased reporting that a high profile figure accused of criminal charges is entitled to be accorded.

(4) The test to be applied

Prejudice to the applicant emanating from the pre-trial publicity having been established, the real question is whether it was of such magnitude as "very effectively to poison the fountain of justice before it begins to flow" (per WILLS J in *R v Parke* [1903] 2 KB 432 at 438).

It was not in contention, and rightly so, that an accused person who seeks an order prohibiting his prosecution on the ground that circumstances have occurred which would render it unfair (which include pre-trial publicity), must establish on a balance of probability that there is a real or substantial risk that by reason of such circumstances he could not obtain a fair trial. That principle was laid down by this Court in *S v Hartmann and Anor* 1983 (2) ZLR 186 (S) at 195F, 1984 (1) SA 305 (ZS) at 312 E-F, albeit in the context of whether a publication is a contempt of court. The courts of other countries have enunciated the same test. See *R v Savundra* [1968] 52 Cr. App. R. 367 (CA) at 643; *Ex parte Telegraph plc and other appeals* [1993] 2 All ER 971 (CA) at 978c; *R v Taylor and Taylor supra* at 369; *Dagenais v Canadian Broadcasting Corporation supra* at 47 and 69; *Phillips v Nova Scotia supra* at 41; *D v The Director of Public Prosecutions supra* at 507.

The real or substantial risk of partiality of the judge and assessors has to be weighed against the backdrop of the developed system of safeguards that have evolved to prevent just such a contingency. Only when these built-in mechanisms are

inadequate to guarantee impartiality will the test be satisfied and a fair trial rendered impossible of attainment.

(5) The composition of the High Court in a criminal trial

The High Court Act [*Chapter 7:06*] provides that for the purpose of hearing a criminal trial the High Court shall be duly constituted if it consists of one judge of the High Court and two assessors. At the trial, (i) any question of law, or (ii) any question as to whether an issue for decision is one of fact or law, or (iii) any question as to the admissibility of evidence, is to be decided by the judge alone. But any question of fact must be decided by a majority of the three members of the court.

The appointment of a judge to the High Court is by the President after consultation with the Judicial Service Commission. The incumbent must possess specified qualifications. In particular, he or she must have been for not less than seven years, whether continuously or not, qualified to practise as a legal practitioner in Zimbabwe. As a matter of reality, it would be rare indeed for a person to be appointed a judge of the High Court who had been qualified to practise for only seven years. Normally judges are appointed from the ranks of senior legal practitioners in private practice, or from senior members of the Attorney-General's Office or from long-serving magistrates. The Judicial Service Commission, of which the CHIEF JUSTICE and the Attorney-General are members, is tasked to ensure that it recommends for appointment persons of proven ability, conscientiousness and experience.

The qualifications to act as an assessor are prescribed in s 6(1) of the High Court Act and require that:-

> "(a) he has experience in the administration of justice; or
>
> (b) he has experience or skill in any matter which may have to be considered at the trial; or
>
> (c) in the case of a trial involving a juvenile, he has experience or skill in dealing with juveniles; or
>
> (d) he has any other experience or qualification which, in the opinion of the Chief Justice and the Judge President, renders him suitable to act as an assessor in a criminal trial."

If it is considered by the CHIEF JUSTICE and the JUDGE PRESIDENT that a particular criminal trial requires the special experience of a person whose name is not on the prepared list of assessors, the Minister of Justice, Legal and Parliamentary Affairs may be requested to include him or her. Exceptionally in complex trials involving serious offences, regional magistrates and senior legal practitioners in private practice, have acted as assessors. But usually the persons chosen are in retirement, of standing in the community with experience of life and people, such as former interpreters, police officers, district administrators, teachers, law lecturers, industrialists.

Before the commencement of a criminal trial, the judge is required to administer an oath to the assessors that they will give a true verdict according to the evidence upon the issues to be tried.

In practice the Registrar of the High Court will not choose two assessors who have not acted before to preside with the judge. An assessor acting for

the first time invariably will be joined by another who has performed such duty on many occasions.

(6) The capacity of trial judges to disabuse their minds of extraneous and prejudicial matter

Unlike the situation where jurors are the sole arbiters of factual issues, in a criminal trial in the High Court the judge has a voice in the decision of any question of fact. It is necessary, therefore, to consider whether there is any realistic potential on his or her part for the existence of partiality following upon the pre-trial publicity to which the applicant was the victim.

Counsel for the applicant contended that the powerful impact of the media with the public perception of guilt and expectation of a conviction cannot ever be discounted on the part of our judges. Not only are they susceptible to it but also to the opinions of relatives, friends and colleagues who have been influenced. Reliance was placed on these words of LORD WIDGERY CJ in *Attorney-General v Times Newspapers Ltd* [1972] 3 All ER 1136 (QBD) at 1142 c-d:-

> "It is widely recognised that a professional judge is likely to be unaffected by temperate comment on the case before him, even though that comment is one-sided, but we should not, in our judgment, too readily accept the proposition that a judge sitting alone is not open to prejudice of this kind. Unfortunately the comments made on pending proceedings are not always temperate, and, indeed, they may in some instances be so strong as to amount to a threat to the judge that if he does not follow the arguments there put forward, he may be severely criticised, if not pilloried subsequently."

These observations are pertinent and demand respect. I am inclined to think it a fallacy to assume that trial judges cannot be affected by persistent outside information of a prejudicial nature. Judges are mortals with human frailties. Yet it is my firm

conviction that only a remote possibility exists of a judge, imbued with basic impartiality, legal training and power of objective thought, being consciously or subconsciously influenced by extraneous matter.

Even such a possibility has been refuted. In *R v Horsham Justices, ex parte Farquharson and Anor* [1982] 2 All ER 269 (CA) LORD DENNING MR at 287f stated emphatically that:-

> "at a trial judges are not influenced by what they may have read in the newspapers."

The Canadian Courts are equally definite that the training and experience of judges equip them to dismiss from their minds any media publicity adverse and hostile to the accused they are trying. In *Regina v Hubbert* (1975) 11 OR (2d) 464 (Ontario Court of Appeal) at 477, the following *dictum* from an earlier decision was approved:-

> "I have not heard it suggested that a trial judge who had heard about a case is not competent to decide it, and I do not think that his capacity to reject what he has heard before is unique."

More recently, in *Phillips v Nova Scotia supra* CORY J said at 45:-

> "The process of electing the mode of trial is a voluntary exercise freely undertaken by the accused. It follows that an accused must accept all of the consequences flowing from his choice of mode of trial. One of these is that if trial by judge alone is selected it must be assumed that a trial judge trained to be objective and well-versed in the legal burden resting upon the prosecution can readily disabuse him or herself of the prejudicial effects of pre-trial publicity."

See also the remarks to similar effect of SILUNGWE CJ in *Shamwana v The People* [1985] LRC (Crim) 120 (Supreme Court of Zambia) at 151 g-h.

To accept that there is a real or substantial risk of a judge's mind becoming so clogged with prejudice by what he has read or heard about an accused, would mean that it would be impossible to find an impartial judge for a high profile case; and that such an accused could never receive a fair trial. The result would be nothing less than judicial abdication. The proposition needs merely to be stated to convince of its unsoundness.

(7) The capacity of assessors to disabuse themselves of information they are not entitled to consider

The risk of any particular publicity and notoriety of the accused person having the effect of destroying an assessor's indifference or impartiality between the State and the defence is, to my mind, of far lesser degree than in the case of a juror. This is because of significant differences between them.

In the first place, assessors are selected because they possess the type of experience that is prescribed in the High Court Act. They are intelligent people who are deemed to possess the ability to judge. The CHIEF JUSTICE and the JUDGE PRESIDENT may give a directive to the Registrar of the High Court as to who to choose to act as assessors, and are likely to do so in a complex, serious and notorious case. Persons with legal training and practical experience in the operation of the criminal justice system are not excluded.

Second, unlike jurors, assessors acquire a familiarity with criminal trials. Theirs is not an isolated participation never to occur again. Almost invariably they have been members of a trial court on many occasions. They take a far more

active part in the proceedings than do jurors, being permitted to ask questions of the witnesses and of counsel. Their relationship to the trial judge is closer than that of jurors. They sit on the Bench on either side of the judge. It is open to them to discuss the case with the judge during the course of the trial and they tend to do so. The guidance a judge may give them is private and ongoing.

Third, assessors share the responsibility of deciding issues of fact with the trial judge. All have an equal say in such determination. The judge will consult with them up to the stage of verdict.

These differences apart, it is not to be assumed that jurors lack the capacity to put from their minds detrimental and extraneous information acquired elsewhere. Even holding a tentative opinion of the accused person does not make partial a juror, sworn to render a true verdict according to the evidence. In *R v Vermette* (1989) 34 CRR 218 (Supreme Court of Canada) LA FOREST J expressed the view at 225 that in extreme cases of pre-trial publicity:-

> "I am far from thinking that it must necessarily be assumed that a (potential juror) will necessarily be biased".

The same sentiment is to be found in *Dagenais v Canadian Broadcasting Corporation supra* where, at 34, LAMER CJ stated his belief that jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of criminal proceedings. The learned CHIEF JUSTICE referred to the words of LORD TAYLOR CJ in *Ex parte Telegraph plc supra* at 978 that:-

> "a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them".

Similar pronouncements of confidence in the ability of jurors to maintain impartiality, and in their understanding of the responsibility placed upon them, have been expressed in many other judgments. See *R v Lane and Ross* [1970] 1 CCC 196 at 201; *R v* Makow [1974] 20 CCC (2d) 513 (British Columbia Court of Appeal) at 519; R *v Corbett* (1989) 34 CRR 5 (Supreme Court of Canada) at 71; *R v W (D)* (1991) 1 SCR 742 (Supreme Court of Canada) at 761; *R v Coughlan and Young* (1976) 63 Cr. App. R. 33 (CA) at 37 *in fine*; *R v Horsham Justices supra* at 287f; *D v Director of Public Prosecutions supra* at 472; *Z v The Director of Public Prosecutions* [1994] 2 IR 476 (Supreme Court of Ireland) at 496 and 508; *Hinch v The Attorney-General for the State of* V*ictoria* (1987-1988) 164 CLR 15 at 74 (High Court of Australia); *Murphy v The Queen* (1988-1989) 167 CLR 94 (High Court of Australia) at 99; *The Queen v Glennon* (1991-1992) 173 CLR 592 (High Court of Australia) at 603.

If these views reflect correctly, as I believe they do, the good sense and capacity of jurors to act with complete detachment and render a verdict in conformity with the evidence properly admitted, it must follow that there is much less of a likelihood of a judge and assessors being affected in their fact-finding rôle by the intense media coverage which branded the applicant a sexual abuser of male persons.

(8) Judicial mechanisms and procedures

The determination of the existence of a real or substantial risk of partiality at the trial of the applicant does not rest entirely on the deserved faith I have

in this country's judges and assessors to accomplish their task. There is the availability of in-built mechanisms in the criminal law system designed to protect the fairness of the trial. Only when such measures are inadequate to guarantee impartiality and to rid the influence of prejudice, will s 18(2) of the Constitution have been breached and the benefit of the fair trial process lost to the accused.

In the course of this judgment, many of these important safeguards have been mentioned, albeit in a different context. They are, with others:

(i) The solemnity of the oath administered to the prospective assessors; and the presumption that they will perform their bounden duty with integrity, and determine the guilt or innocence of the accused free from extraneous considerations, and free from either prejudice against, or favour for, the accused.

(ii) The instruction or reminders of the trial judge to the assessors that the case is to be decided solely on the evidence elicited at the trial.

(iii) The nature of a trial being to focus the minds of the assessors on the evidence put before them rather than on prior publicity detrimental to the accused.

(iv) The participation of the trial judge in the fact-finding process.

(v) The ready access the assessors have to the trial judge and the ongoing guidance he or she is able to provide to them at all stages of the trial.

(vi) The statutory requirement that reasons for any factual finding must be furnished (see s 10(4)(b) of the High Court Act), with the prospect of an appeal if such findings are not justified on the admissible evidence.

(vii) The experience required of persons in order to quality for appointment as assessors. And the authority given to the CHIEF JUSTICE and JUDGE PRESIDENT to direct the Registrar of the High Court to choose those considered to be best placed to deal with a particular case, including persons with legal training.

(viii) The right of the accused to challenge, without assigning any cause, two persons chosen to be assessors at the trial (see s 6(4) of the High Court Act) and, presumably on good cause, to seek the recusal of an assessor.

And exceptionally,

(ix) The postponement of the trial for a period sufficient to allow the adverse pre-trial publicity to abate, the staying power and detail of which are limited.

(9) The conclusion

I have already referred to a series of recent judgments in which the English courts granted a stay of proceedings on the ground of a real or substantial risk of the jurors having been influenced in their decision by what they had read in the newspapers. A stronger line appears to have been taken by the highest courts of Canada and Australia.

In *R v Vermette supra* the accused, an inspector in the Royal Canadian Mounted Police, was being tried with the theft of computer tapes containing a list of members of the Parti québécois. During the course of the defence case the Premier of Quebec in a colourful and abusive diatribe before the National Assembly denounced not only the credibility of the accused's witnesses but also that of the defence lawyers. His remarks received exceptional publicity in the media on the following and succeeding days. The Supreme Court held that the order of the lower court staying the proceedings was not justified (see at 226).

In the Australian case of *The Queen v Glennon supra* the respondent was a Roman Catholic priest. He had been convicted on a charge of indecently assaulting a girl under the age of sixteen. Several years later the respondent was a witness in a criminal trial before the magistrates court in which he was cross-examined about his conviction and about an alleged homosexual rape of one of the accused. Extensive publicity was given in the media to the allegation. A radio commentator mounted an attack on the respondent in three separate broadcasts in which he alleged grave criminal conduct and sexual impropriety, and specifically referred to his prior conviction. Subsequently the respondent was charged with seventeen counts of sexual offences against young people. An application for a permanent stay of proceedings on the basis that the respondent would be unable to receive a fair trial because of the prejudicial effect of the pre-trial publicity was dismissed at first instance. The trial proceeded and the respondent was convicted. The Court of Criminal Appeal, by a majority, allowed an appeal by the respondent, holding that the pre-trial publicity had prohibited a fair trial. In a further appeal, the

High Court restored the decision of the trial court. BRENNAN J (as he then was) said at 613-614:-

> "(It) does not follow that, where a punishable contempt of court has been committed, the trial must be aborted. If that were the consequence of punishable contempt, the penalties imposed for contempt would be far harsher than those presently imposed, for the contempt would totally defeat the enforcement of the criminal law and penalties for contempt would have to reflect that fact. Administration of the criminal law cannot be made hostage to conduct amounting to contempt of court, even if the contempt be flagrant. If it were otherwise, the perpetrators of crimes which shock the public conscience, such as those charged in *Murphy v The Queen supra*, would oftentimes go untried and unpunished, for pre-trial publicity prejudicial to an accused is stimulated by the notoriety of the accused and the heinousness of the crime. Yet it would undermine the criminal law's protection of society and its members to refuse to allow the law to take its ordinary course in these cases. The administration of criminal justice by the courts, which proceeds inexorably to its conclusion in each case, would be adventitious if trials could be halted by a punishable contempt. In cases where a punishable contempt is committed – at least where the contempt is flagrant – public obloquy would be substituted for jury verdict and trial by media would supersede trial according to law. No community governed by law could acknowledge that persons outside the control of the State could possess such a capacity for disrupting the administration of criminal justice."

It is this approach that commends itself as worthy of adoption by our courts.

In the result I am entirely satisfied that the applicant has failed to discharge the burden of establishing the existence of a real or substantial risk of not being afforded a fair hearing before the High Court on the charges for which he has been indicted by the Attorney-General.

THE ALTERNATIVE ISSUE

Prior to the inception of the trial the applicant was furnished by the Attorney-General with copies of statements of the witnesses who were to testify for the State, as well as others recorded from persons whom it was not intended to call,

and all documents which were to be produced as exhibits. This disclosure was in compliance with the ruling of the High Court in *S v Sithole* 1996 (2) ZLR 575 (H) at 593H-594C; See also *Shabalala and Ors v Attorney-General of the Transvaal and Anor* 1995 (12) BCLR 1593 (CC) at para 37, 1996 (1) SA 725 (CC) at para 37; *S v Scholtz* 1997 (1) BCLR 103 (NmS) at 105 B-F; *Molapo v Director of Public Prosecutions* 1997 (8) BCLR 1154 (Les) at 1164H-1165F; *S v Angula and Ors; S v Lucas* 1997 (9) BCLR 1314 (NmH) at 1318I-1319F; *R v Stinchcombe* (1992) LRC (Crim) 68 (Supreme Court of Canada) at 78h and 79h-80c.

The decisions cited establish further that the State is entitled to withhold any document in respect to which it is able to satisfy the court, on a balance of probabilities, that disclosure to the defence might reasonably impede the ends of justice, or otherwise be contrary to public interest. Examples of such claims are where the information sought –

(i) would disclose the identity of an informer whom it is necessary to protect;

(ii) would disclose police techniques of investigation which it is similarly necessary to protect;

(iii) might imperil the safety of the witness;

(iv) would otherwise not be in the interest of the public or the State.

The applicant was not content with the disclosure made. He sought an order directing the Attorney-General to make available the investigation diary (or

diary log) contained in the police docket. This was refused on the ground of confidentiality. The entries therein were those of the investigating officer, the supervisory police officer and members of the Attorney-General's Office who had issued instructions to the investigating officer. In short, blanket privilege was asserted in respect of the entire investigation diary.

Of course, the nature of an investigation diary does not in itself entitle protection from disclosure. If the order in *Phato v Attorney-General, Eastern Cape and Anor* 1994 (5) BCLR 99 (E) at 134H, 1995 (1) SA 799 (E) at 837E suggests the contrary, I would respectfully disagree with it. It is the information reflected in the entries, or some of it, that may be of relevant assistance to the accused.

In my opinion there is an obligation on the Attorney-General to reveal to the defence, whether requested to do so or not, any information entered in the investigation diary which it may reasonably require, or deem to be of assistance, for the protection of the accused's rights. A substantial measure of good faith and fair play is essential, since the defence and the court will be unaware of whether any of the entries in the diary may tend to advance the accused's case.

Should the assertion that some entries in the investigation diary may be supportive of the accused's innocence be met with a disclaimer by the Attorney-General, then it would seem to me desirable that the trial court decide what should or should not be disclosed. See *S v Scholtz supra* at 117 B-C; *R v Davis and other appeals* [1993] 2 All ER 643 (CA) at 648 c-d; *R v Keane* [1994] 2 All ER 478 (CA)

at 484j-485c; *R v Mills* [1997] 3 All ER 780 (HL) at 798 a-d. It is obviously unsatisfactory to permit the Attorney-General to be judge in his own cause.

I have endeavoured to provide some guidance for the future, even though the issue of what more the Attorney-General should disclose to the applicant was resolved during argument. The Director of Public Prosecutions gave a firm undertaking not to withhold the name and address of any person interviewed by the police from whom a statement was not recorded; as well as any other material of an evidential nature. He is to be commended for adopting that approach, which proved acceptable to the applicant's counsel. In the circumstances the grant of an order was not persisted with.

THE COSTS

An important constitutional point was raised by the applicant. It was *res nova* in this and other jurisdictions. Nor was the answer self-evident. Furthermore, the argument of Mr *Andersen* was of much assistance to the Court.

Despite the failure of the application, I propose to apply the principle set out in *Bull v Minister of Home Affairs* 1986 (1) ZLR 202 (S) at 203 G-H, 1986 (3) SA 875 (ZS) at 876 B-C; *Attorney-General v Blumears and Anor* 1991 (1) ZLR 118 (S) at 126 F-G; and *Nyambirai v NSSA and Anor* 1995 (2) ZLR 1 (S) at 16B, 1995 (9) BCLR 1221 (ZS) at 1233 H-I. Accordingly, the applicant is not to be penalised in costs.

THE ORDER

The application for a stay of the criminal proceedings instituted against the applicant is dismissed. There is to be no order as to costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA AJA: I agree.

Midzi Ziweni & Partners, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners