

SOUTH AFRICA / JUDGMENT

S v Harber and Another

(341/1986) [1988] ZASCA 34; [1988] 4 All SA 496 (AD) (30 March 1988)

[1988] ZASCA 34

COURT

Supreme Court of Appeal

BEFORE

Rabie, Jansen, Van Heerden, Vivier, Viljoen

CASE / FILE NUMBER

341/1986

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LL Case No 341/1986

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between: ANTON PAUL HARBER First Appellant
 JO-ANN BEKKER Second Appellant
 and
 THE STATE Respondent
CORAM: RABIE ACJ, JANSEN, VAN HEERDEN, VIVIER JJA et VILJOEN AJA
HEARD: 11 MARCH 1988
DELIVERED: 30 MARCH 1988

JUDGMENT

/VAN HEERDEN JA ...

2. VAN HEERDEN JA:

In the issue of Weekly Mail of 2 May 1986 there appeared a number of articles concerning a criminal trial in the Transvaal Provincial Division. This trial, in which 22 accused were arraigned on charges of high treason, had then been in progress at Delmas for more than 3 months. before Van Dijkhorst J and assessors. One article appeared under the heading "A Judge's Own Notes on Police Activities" and read as follows:

"Notes made by a judge while watching video footage shown by lawyers for the treason trialists in Delmas throw a remarkable light on police action during the September 1984 unrest. Lawyers submitted the film to support their contention that violence after a mass funeral in Evaton was the result of police action. What follows is presiding judge Justice J. van Dijkhorst's record of the video footage:

'A group of people are seen running to the side of the road presumably trying to get away from their bus which has been stopped. One of the Hippos veers right to cut them off. The cameraman then records the following incidents:

Police sjambokking through windows, no obvious reason. The Brigadier (G. Viljoen, in charge of riot control in the Vaal during

/September....

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September 1984) is seen, his back facing the camera. He is waving his arms and presumably says something to the police sjambokking at the windows because they stop. He then turns and walks out of view at which stage police continue sjambokking at the windows. A person is then struck in the face by a policeman. A policeman is seen sjambokking perhaps three people in the top of the bus. They talk to him and he stops. However when he sees another policeman climbing up he suddenly starts sjambokking again. You then see a person being kicked on the ground. You then see a youth running away, jumping over a fence and being hauled back. You then see the aforesaid two policemen on top of the bus forcing a person off the top and taking a swipe at his hands with batons as he is about to drop. You then see a person in grey pants and a white shirt in the custody of a policeman. A black policeman comes up and starts to assault him. You then see the Colonel on the top of the Land Rover. His smile is questionable. You again see the person in the grey pants and white shirt being taken to where a number of people have been grouped on the side of the road, seated. On his way you see him being struck on the head by the butt of the rifle. On reaching the group he is tripped and almost immediately thereafter he is again struck by a baton. What did this poor fellow do to deserve all this attention?"

(My underlining.)

/In ...

4.

In a second article the following was stated:

"The Van der Walt Commission into the September uprising in the Vaal townships could have major implications for the 22 men facing charges of high treason in Delmas."

And:

"The report was submitted to the government in March 1985 but was only tabled in parliament a fortnight ago. The reason for the delay is a mystery. One wonders if the protracted Delmas trial might have taken a different route had the findings been made available earlier."

A third article contained the following:

"New evidence which could shake the state's case includes the following:

The tabling of the official Van der Walt Commission's findings on the causes of the September 1984 uprising. The report found grievances against rent increases and corrupt councillors, and not 'agitators', were responsible for the revolt. Brigadier G Viljoen, the policeman in charge of the riot units in the Vaal during the uprising, conceded under cross-examination that he had received no briefing on the situation in the Vaal before taking control.

Esau Mahlatsi, mayor of the Lekoa Town Council, seemed to give substance to allegations of /corruption ...

5.

corruption in the councils when he admitted that councillors had divided liquor outlets amongst themselves."

On 5 May 1986 Van Dijkhorst J issued a rule nisi calling upon the editor of Weekly Mail (the first appellant) and the reporter concerned (the second appellant) to show cause why they should not be convicted of contempt of court. As regards the first article, he placed on record that the notes quoted were not his, that he did not make any notes on the video film available to anyone, and that nobody had access to his notes.

On the return day of the rule nisi the appellants and an attorney, Mr Dison, gave evidence. The latter, a partner in a firm of attorneys which represented some of the accused in the treason trial, said that he had seen the video film prior to its screening in court. His partner, Sutherland, was present when the film was shown. Subsequently they spoke about the trial and Sutherland handed him a set of notes.

/He ...

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He read through the notes and it seemed to him "as if they had been the observations of the Court, very much as if a Court makes observations after it goes on an inspection in loco and certain notes are recorded".

At a later stage the witness was approached by the second appellant. She was particularly interested in the video film and he gave her the notes, saying that they were made by the court at the time when the film was shown. He also gave her some transcripts of the court record and one or two documents pertaining to the trial. It was only after the publication of the articles that it was pointed out to him by other legal representatives of the accused that the notes were in fact

not the judge's notes. (It would appear that Sutherland was the author thereof.) Dison immediately approached the judge, furnished him with a copy of the newspaper, and gave an explanation of the error.

The first appellant testified that he requested

/the ...

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the second appellant to do a feature article on the treason trial and suggested that she speak to Dison. He regarded the appellant, whose services as a free lance reporter he had previously used, as "an experienced, competent and very reliable reporter". He read the articles written by her prior to their publication, discussed them with his colleagues and was satisfied with the contents. As regards the article dealing with the notes, he said that he had no reason to believe that they were not the judge's notes; on the contrary, he firmly believed that

they were. Asked by the court whether he had ever come across a case where a judge's notes had been published, he replied: "Only when those notes have been made part of the record."

The first appellant also testified that he was satisfied that the sections of the other articles to which the rule nisi related, were reasonable summaries of the

proceedings at the trial. When asked by Van Dijkhorst J

/whether ...

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whether a journalist is entitled to speculate on the influence a piece of evidence may have on the court, he said:

"I think it is the reporter's job to indicate the importance of this evidence and that is what Miss Bekker has done, she has said it is important evidence because it will affect the state's case."

The second appellant testified that she approached Dison to obtain material on the treason trial. Reference was made to the video film and Dison furnished her with certain notes saying: "These are the Court's notes." She understood that the document contained "notes that somebody had taken of what the Judge had read into the record". When she wrote the articles she was consequently under the impression, that the notes had been incorporated in the record of the proceedings.

She said that she was not responsible for the head-line of the article relating to the judge's notes, and that a sub-editor would have been the author thereof. Her

/comment ...

9.

comment preceding the quotation of the notes had also been slightly rewritten. She could not remember whether she used the word "notes" or "record" but said that she intended to convey that the contents represented the judge's formal observations. She also could not remember using the phrase "a remarkable light". Eventually she said that she did not use the words "Notes made by a judge while watching video footage" and that her words were: "What follows is presiding Judge J van Dijkhorst's record of the video footage".

With regard to her comment that the report of the Van der Walt Commission "could have major implications for the 22 men facing charges of high treason at Delmas", she said that she had in mind that the Commission had been investigating the causes of the September unrest which was "a primary aspect of the case".

She also dealt with her comment "one wonders if the protracted Delmas trial might have taken a different route ...

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route had the findings been made available earlier". She stated that she intended to suggest that the findings were pertinent and may have changed "the direction of the state's prosecution". Asked by the court what she meant by writing that the Commission "could have major implications" for the 22 accused, she replied that she thought that if the court accepted the findings of the Commission it might find that . . . individual agitators had not played a major role in the unrest.

As regards the comment that new evidence "could shake the State's case", she said that "it just seemed that it was dramatic evidence which might have implications for the State's case."

Van Dijkhorst J found that the article relating to the judge's notes was contemptuous in that:

"(a) It falsely leads the public to believe that the judge acted irregularly by making his own notes which are not part

of the record and which purport to set out his impressions of and his comment upon ...

11.

upon the evidence available to the press.

(b) It falsely leads the public to believe

that the judge did this while the case is still being tried and without having given counsel an opportunity to address the court on the correctness of the observations.

(c) It prejudices an issue in the case."

The learned judge remarked that he was not satis-

fied with the explanations placed before the court but re-frained from finding that the appellants did not genuinely believe that the notes had been made by him and had been entered into the record of the proceedings. He consequently did not find that the appellants intentionally committed contempt of court but went on to consider whether intent is an element of that offence. His conclusion was that the proprietor, publisher and editor of a newspaper in which contemptuous matter appears is liable even in the absence of mens rea. In the view of the judge this strict liability does not, however, apply to the reporter responsible

for the publication of the matter. In the result only

/the ...

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the first appellant was found guilty of contempt of court in regard to the article about the judge's notes.

As regards the other articles, Van Dijkhorst J applied the test whether the comments in question tended to interfere with the administration of justice in pending proceedings. He concluded that there is an absolute rule against the media prejudging issues in pending cases and that the sections of the articles in question contained "speculative comment on the evidence, the weight thereof and the effect which it may or may not have on the outcome of the case which is an unwarranted and unacceptable interference with the due administration of justice". Since the appellants wilfully caused the comments to be published, both were found guilty of contempt of court in regard thereto.

The first appellant was sentenced to a fine of R750 or three months' imprisonment and ordered to publish

in the next issue of The Weekly Mail an apology approved of

/by ...

13.

by the judge. The sentence of the second appellant was a fine of R200 or one month's imprisonment which was, however, conditionally suspended. Subsequently the appellants were granted leave by Van Dijkhorst J to appeal to this court against their convictions.

As regards the article concerning the judge's notes, counsel for the respondent submitted that the first appellant foresaw the possibility that the notes had not been read into the record of the treason trial and that he reconciled himself with that possibility when authorising the publication of the article. In support of the submission counsel argued that there is nothing in the article which suggests that the judge read the notes into the record; that the heading of the

article reads "A Judge's Own Notes ..."; that the introductory paragraph refers to "notes made by a judge while watching video footage", and that it is inconceivable that the judge would have read into the record the comments underlined by me.

/To...

14.

To some extent the argument presupposes, of

course, that the first appellant read the sub-edited article and not the original report written by the second appellant. Counsel for the respondent also submitted, however, that that is indeed what had happened, and relied exclusively on an affirmative reply by the first appellant to the question: "Did you notice in particular the portion dealing with the Judge's notes on police activities?" This answer, it was argued, was a reference to the heading of the report. I cannot agree. The notes which were quoted in the second appellant's original report clearly dealt with police activities and the heading merely highlighted that fact. Hence it cannot be inferred from the mere reference to such activities that either the questioner or the witness had the heading in mind. Moreover, the preceding questions related solely to the report submitted by the second appellant.

But even if it is assumed that the first appellant

/read ...

15.

read the sub-edited report, I am not persuaded that he contemplated the possibility that the notes were the judge's private notes which had not been incorporated in the record 2. When asked by Van Dijkhorst J whether he had any experience of a reporter having access to a judge's notes by virtue of their being handed to the reporter, the first appellant replied: "No, the Judge's notes are only made available to the reporter once they are read into the record". This, of course, accords with common sense and experience. It is therefore improbable that

the notion that the second appellant might have obtained

the judge's private notes ever entered the first appellant's mind. Nor, in my view, is it a necessary inference that he must have suspected that the notes were in fact not the judge's notes. In particular I do not think that the use of the word "notes" instead of a more formal word such as "observations", or the fact that the notes, if recorded, would have contained some highly unusual comments, must

/necessarily ...

16.

necessarily have put the first appellant on his guard. These factors would no doubt have struck most lawyers, but could well have escaped a layman not conversant with legal niceties. Moreover, although saying that he was not satisfied with the explanations proffered by the witnesses, Van Dijkhorst J did not disbelieve the first appellant. It must therefore be accepted that the latter did not know, and did not foresee the possibility, that the notes had not been read into the record.

I turn now to the question whether intention is an element of contempt of court. I shall deal later with a number of early cases in which those responsible for the publication of contemptuous matter in newspapers were held liable for contempt in the absence of intention. Apart from the so-called newspaper cases, however, I am not aware of any South African authority for the proposition that contempt is a crime of strict liability. On the contrary, during the last two decades it seems to have been generally

/accepted ...

17. accepted that intention is an element of the offence. In *S v Van Staden en 'n Ander* 1973 (1) SA 70 (SWA), Trengove J pertinently held that intention is a requisite of that form of contempt consisting of an interference with the administration of justice and, indeed, of all manifestations of the offence. And in *S v Van Niekerk* 1970 (3) SA 655 (T) 657, and *S v Kaakunga* 1978 (1) SA 1190 (SWA) 1193, it was held that an accused cannot be found guilty of contempt merely because his conduct constituted a violation of the dignity, repute or authority of a court; he must also have intended to bring about that consequence. Reference may also be made to *S v Gibson N 0 and Others* 1979 (4) SA 115 (D) 121, in which Milne J expressed agreement with a submission that contempt of court is a crime of intention.

In *S v Van Niekerk* 1972 (3) SA 711 (A), this court found that the appellant had addressed an exhorta-

tion to all judges that, contrary to their duty to consider

/all ...

18.

all evidence on its merits, they should, in effect, ignore the testimony of all witnesses previously detained under the Terrorism Act (83 of 1967), and that his remarks had been made with reference, inter alia, to the then current proceedings in *S v Hassim and Others*. It was alleged in the relevant count that the appellant had made his exhortation with intent to prejudice and influence the judgment in *S v Hassim and Others*. Although, in finding that the appellant had committed contempt of court, Ogilvie Thompson CJ did not in so many words deal with the question of mens rea, it seems to be, implicit in his reasoning that he regarded intention as an element of contempt of court, or at any rate of the form of contempt of which the appellant had been convicted.

In *S v Beyers* 1968 (3) SA 70 (A) 77, Steyn CJ quoted with apparent approval M de Villiers' definition of contempt of court according to which an

intentional violation of inter alia the administration of

/justice ...

19.

justice is required.

In *Makiwame v Die Afrikaanse Pers Bpk en 'n Ander* 1957 (2) SA 560 (W), Hiemstra J took a different view. In that case it was conceded by the respondents that impermissible comment had been published in a newspaper in regard to pending criminal proceedings. Hiemstra J found (at p562) that "daar geen opset was om die strafverhoor te beïnvloed nie", but added that the absence of intention or mens rea was no defence. In the result he made a declaratory order to the effect that the respondents had committed contempt of court. What is not clear, is whether he was of the view that the question of mens rea was irrelevant because it was a newspaper case, or whether he intended to hold that contempt is in every instance a crime of strict liability.

The only authority on which the learned judge relied, was *R v Odham's Press Ltd and Others* (1958) 3 All

E R 494. In that case it was not in dispute that an

/article ...

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article published in a newspaper was calculated to prejudice the fair trial of pending criminal proceedings. The only defence raised was that the respondents had no knowledge of the pending proceedings. After referring to two cases decided in 1742 and 1806, Lord Goddard CJ said the following in regard to this defence (at p 497):

"These cases clearly show that lack of intention or knowledge is no excuse ... and in our opinion they dispose of the argument that mens rea must be present to constitute a contempt of which the court will take cognisance and punish. The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know the matter was defamatory and had no intention to defame. It is obvious that if a person does not know that proceedings have begun or are imminent, he cannot by writing or speech be said to intend to influence the course of justice or to prejudice a litigant or accused person, but that is no answer if he publishes that which in fact is calculated to prejudice a fair trial." (My underlining.)

The first and second respondents were respectively

21.

the proprietor and editor of the newspaper concerned, but one notes that Lord Goddard CJ did not hold that the strict liability rule applies only to those responsible for the publication of a newspaper or another form of the media. On the contrary, that he intended to formulate a principle of general application is made clear by his use of the underlined words and by the fact that the third respondent, the reporter who wrote the offending article but had no say as to what appeared in the newspaper, was also found guilty of contempt of court. Until the harshness of the strict liability rule was ameliorated first by s 11 of the Administration of Justice Act, 1960, and later more comprehensively by the Contempt of Court Act, 1981, the position in English law was therefore that the rule applied in regard to any publication, in the wide sense of the word, of a contemptuous matter. See also Borrie and Lowe, *Law of Contempt*, 2nd ed, pp 70-72.

In my view there are sound reasons why the strict

/liability ...

22.

liability rule, as a principle of general application, should not be followed in our law. Firstly, that form of contempt of court which is most prevalent, viz conduct which tends to interfere with the administration of justice in pending proceedings, is the same crime as defeating or obstructing the course of justice or an attempt to do so. As was said by Steyn CJ in *Afrikaanse Pers-Publikasie (Edms) Bpk en 'n Ander v Mbeki* 1964 (4) SA 618 (A) 626:

"Hierdie vorm van minagting is tegelyk ook 'n stremming of belemmering van die regspleging, of a poging daartoe. Dit is dieselfde mis-daad onder 'n ander naam."

There is no doubt that intention is an element of the crime of defeating or obstructing the course of justice. See *R v Zackon* 1919 AD 175, 182; *R v Port Shepstone Investments (Pty) Ltd and Another* 1950 (4) SA 629 (A) 639; and *R v Bekker* 1956 (2) SA 279 (A)

281. It would therefore be highly anomalous if the requirement of intention could be circumvented by charging an accused with

/contempt ...

23.

contempt instead of, say, an attempt to obstruct the course of justice. Secondly, this court has stated that the principle that *actus non facit reum, nisi mens sit rea* is a fundamental principle of our criminal law: *S v Bernardus* 1965 (3) SA 287 (A) 296, and *S v Qumbella* 1966

(4) SA 356 (A) 364. For this reason it has repeatedly been pointed out that *mens rea* is an element of all common law crimes. And it is hardly necessary to say that as a rule the required form of *mens rea* is intention.

The court a quo, of course, did not decide that contempt of court is a crime of strict liability. It did, however, hold that the proprietor, publisher and editor of a newspaper are liable even in the absence of intention. In this regard reliance was placed on a number of cases, most of which were decided during the last century and the first decade of this century.

It is not clear to me that in all the cases re-ferred to by the court a quo the respondent was held liable

/for ...

24.

for contempt even though he had no intention of committing contempt. In *R v Drew* 1907 0 R C 111, the editor of a newspaper appeared in person and explained that he had no intention to interfere with the course of justice in writing certain articles, but the judgment contains no reference to his explanation, and it would appear that whatever the editor's motive may have been, he must have foreseen that the publication of the articles could prejudice pending proceedings. In *Dunston, N O v Transvaal Chronicle, Ltd and Sampson* 1913 TPD 557, the court was satisfied that "there" was no special malicious intent in the respondents" (ap-parently the proprietor and editor of a newspaper), but found that they had made a patent error of judgment. What the nature of this error was, was not explained. It is accordingly not possible to determine whether the respon-dents were held liable in the absence of intent, as dis-tinguished from "special malicious intent".

In *In re Dormer* 4 S A R 64, the editor of a

/newspaper ...

25.

newspaper was fined for contempt of court. Van Dijkhorst

I correctly pointed out that the question of mens rea was not argued in Dormer's case, but then added that all con-cerned obviously accepted that the press was strictly liable. I do not think that this inference is justified. It is as possible that all concerned accepted that if the matter published was contemptuous the editor intended to commit contempt.

In the following cases, however, it would appear that the proprietor, printer, publisher or editor of a news-paper was found guilty of contempt of court on the basis of strict liability: *In re Cooke v Davis* 1893 'N L R 13; *Hershensohn v Davis* 1894 N L R 160; *Fromberg v Halle and Another* 1904 T H 54; *In re Norrie v Consani* 19332 CPD 313; *In re Blanch and Richardson* 1882 H C G 83; *Dempster and Others v Robinson and Others* 1907 N L R 128; and *Clerk of the Peace v P. Davis* 1908 N L R

20. It is not apparent from the judgments in the first four cases whether the courts

/were ...

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were of the view that mens rea is not an element of contempt of court, or that specifically those responsible for the publication of a newspaper are strictly liable. As has been seen, the same can be said of Makiwame's case, *supra*. In the other three cases there are some indications that the respondents were held strictly liable because they were the editors, proprietors, etc of the newspaper concerned. In Blanch's case Buchanan JP remarked that the publisher of a newspaper occupies a responsible position and that it is his duty to exercise careful supervision over matter inserted in it; in Dempster's case it was said that ignorance of the fact that proceedings are pending does not exculpate the editor or publisher of a newspaper, and in *Clerk of the Peace v P Davis* the proprietor, printer and publisher of two newspapers was apparently held vicariously liable for contempt committed by an employee of his in causing a contemptuous article to be published.

In none of the seven cases was the question of

/mens ...

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mens rea pertinently raised by the respondents. Nor did the courts cite any authority in regard to that question. It seems a fair assumption, however, that the courts were to a large extent influenced by the strict liability rule of English law.

In *re Mackenzie* 1933 A D 367 is the only case in which a person responsible for a newspaper was found guilty of contempt by this court. A letter relating to a decision to hear an appeal in Cape Town had been published in a newspaper and thereafter a rule was issued calling upon the editor of the newspaper to show cause why he should not be committed for contempt of court. In his judgment Stratford ACJ stated that the only questions before the court were whether the expressions in the letter amounted to contempt of court and, if so, what order should be made. It would therefore appear that the question whether the editor could be held liable in the absence of mens rea was not raised by his counsel and was therefore not

/pertinently...

28.

pertinently considered by this court. Having found that

the letter was contemptuous, and when dealing with the ap-

propriate penalty, Stratford ACJ did, however, refer to an explanation by the editor that he had not realised the import of the letter. He said that it was difficult to accept this explanation but added (at p 370) "the least we can say is that he [the editor] ought to have appreciated the import of the letter".

Hunt, South African Criminal Law and Procedure, 2nd ed, vol 2, p 191, n 107, submits that the decision is to be explained on the basis that the editor was found to have acted with *dolus eventualis*. I do not think, however, that this court came to the firm conclusion that the editor actually foresaw the possibility that the letter contained contemptuous matter. On the other hand, the court was clearly of the view that the editor acted negligently and it may be that he was found guilty because of the presence of that form of *mens rea*. The decision is accordingly not

/clear ...

29.

clear authority for the proposition that an editor is strictly liable for the publication of contemptuous matter in his newspaper.

The above survey shows that in a number of cases decided since the last century the proprietor, publisher, printer or editor of a newspaper was held liable for contempt of court in the absence of intention, and apparently also negligence, but that this court has not unequivocally decided that "the press" is strictly liable. The decisions of the lower courts are, no doubt, in conflict with the aforesaid fundamental principle of our common law, and the question arises whether there are compelling reasons for recognising an exception to the general requirement of intention as an element of contempt of court.

With reference to the decision of this court in *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A), Van Dijkhorat J expressed the view that the reasons for holding the press strictly liable for defamation apply with equal

/force ...

30.

force in cases of contempt of court. In that case Rumpff

CJ quoted a passage from his judgment in *Suid-Afrikaanse*

Uitsaaikorporasie v O'Malley 1977 (3) SA 394 (A) 404-5, where he said:

"Na my mening sou daar egter goeie redes bestaan waarom hierdie klas van persone [i.e. the owner, printer, publisher and editor of a newspaper] skuldloos aan-spreeklik behoort te wees, by wyse van uitsondering. Die uitsondering sou wesenlik gegrond kon wees op beskerming van die gewone burger teen 'n klas van persone wat by 'n medium betrokke is, wat van so 'n aard is, dat in geval van laster ge-pleeg in die medium, dit moeilik is om die opset by 'n bepaalde persoon tuis te bring."

If contemptuous matter is published in a newspaper it may likewise be difficult to prove that a particular person intended to commit contempt of court. I do not think, however, that this is a sufficient reason for holding the owner, printer, publisher and editor of a newspaper criminally liable in the absence of any form of blameworthiness. If a defamatory statement appears in a

31.

newspaper, considerations of equity and policy require that the person defamed should be able to obtain satisfaction from those responsible for the publication of the newspaper, but in my view the due administration of justice does not require that there should be a conviction for a criminal offence merely because of the publication of contemptuous matter in a newspaper. In most cases it will appear that the author of the objectionable article, letter etc intended to commit contempt of court, and his conviction will no doubt have a powerful deterring effect on others who contribute to the contents of a newspaper. On the other hand, the press is so powerful, influences public opinion to such an extent and is in such a unique position to disseminate matter which may tend to interfere with the administration of justice, that it can validly be required to exercise due care to avoid the publication of such matter. As was stated in the Phillimore Report in regard to the English law of contempt of court (Cmnd 5794, para 74):

/"A ...

32.

"A liability which rested only on proof of intent or actual foresight would favour the reckless at the expense of the careful. Most publishing is a commercial enterprise undertaken for profit and the power of the printed ... word is such that the administration of justice would not be adequately protected without a rule that requires great care to be taken to ensure that offending material is not published." It therefore appears to me that there are sound

policy considerations for holding at least the editor of a newspaper, or another form of the media, liable for contempt of court if he acted either intentionally or negligently. Such a rule will on the one hand serve to safeguard the due administration of justice and on the other be consonant with the general principle that there should be no criminal liability in the absence of blameworthiness. The question whether the proprietor, printer and publisher of a newspaper, or those responsible for radio and television programmes, should be similarly liable, does not arise in this appeal and therefore need not be

considered.

/Counsel ...

33.

Counsel for the respondent submitted that even if the newspaper cases were wrongly decided, this court should not now depart from a principle which has been applied for more than a century. It is true that where decisions of lower courts have been regarded for a long period of time as being correct, this court should not lightly disturb them. An important consideration, however, is that persons acting on such decisions may be prejudiced were they to be overruled: *Holmes' Executor and Others v Rawbone and Others* 1954 (3) SA 703 (A) 711. This consideration does not arise in casu. Moreover, and as already pointed out, it is by no means clear that in deciding the cases in question the courts were not of the view that in all cases contempt of court is a

crime of strict liability, and there can be no justification for recognising such a wide strict liability rule in our law. And in any event the principle that criminal liability should not attach to an innocent act was not yet firmly

/established ...34.

established when the early newspaper cases were decided. Hence I am of the view that those cases should not be followed in so far as they may be said to establish a rule that contempt of court is a crime of strict liability, whether generally or only in regard to the press.

In view of certain submissions made by counsel for the appellant it is convenient at this stage to consider the test to be applied in determining whether conduct constitutes that form of contempt which consists in an interference with the administration of justice. It will be recalled that in Van Niekerk's case, *supra*, the appellant's exhortation had been made with reference to *inter alia* pending criminal proceedings. Ogilvie Thompson CJ assumed that the presiding judge in those proceedings and his assessors would in fact not have been in any way influenced by the exhortation, even if that had been brought to their attention, and on this

/assumption ...35.

assumption considered a submission that the appellant had been wrongly convicted of contempt of court. In making this submission counsel for the appellant relied upon English cases. Having referred to the distinction drawn in English law, relative to the form of contempt under discussion, between jury trials and other trials or appeals where no jury is concerned, Ogilvie Thompson CJ pointed out that as regards non-jury proceedings the English courts have adopted a less strict attitude than our own courts. He quoted various dicta from the decisions in *R v Hardy* 1904 N L R 359 at 366, 369 and 372; *Tennant and Another v Bisset and Another* 1932 CPD 124 at 126; *In re Norrie v Consani* 1932 CPD 313 at 316; and *Maeder v Perm-Us (Pty) Ltd* 1939 CPD 208 at 212, and concluded as follows (at p 724):

"Even postulating a statement clearly capable of influencing the administration of justice in a pending proceeding, it is manifestly impossible to determine whether that state-

/ment ...

36.

ment would in fact influence the particular tribunal. To mention merely one aspect, much would obviously depend upon the individual or individuals constituting the particular tribunal concerned. Accordingly, and bearing in mind the rationale of the type of contempt of Court presently under consideration, I am of opinion that the principle adopted, over a considerable period of time, by the above-cited cases is a salutary one which should be maintained. I accordingly hold that the test to be applied is whether the statement or document in issue tends to prejudice or interfere with the administration of justice in a pending proceeding."

Counsel for the appellant submitted that on an application of the "tendency" test a likelihood of pre-judice to the administration of justice must be proved. I am unable to agree. In Van Niekerk's case this court found that the exhortation was contemptuous although it was assumed that there was no risk of prejudice. The reason, presumably, is that an attempt to interfere with the administration of justice, as well as an actual interference, falls within the ambit of the substantive offence of contempt of court.

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In the alternative it was submitted that the "tendency" test rests on insubstantial foundations; that in adopting the test the courts were largely influenced by English law; that it is out of keeping with developments in that legal system, and that it should be reconsidered.

It is true that the formulation of the applicable test in Hardy's case and Tennant's case was not based on any authority and that in the other cases referred to by Ogilvie Thompson CJ reliance was placed only on Tennant's case, decisions following that case, and English authorities. It can also be accepted that in adopting the "tendency" test the courts were to some extent influenced by English law. The reason, no doubt, is that the inclusion of an interference with the administration of justice in the definition of contempt of court was derived by our courts from English law: *Afrikaanse Pers-Publikasie (Edms) Bpk en 'n Ander v Mbeki* 1964 (4) SA 618 (A) 627. This does not mean, however, that our courts unhesitatingly

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followed English cases. In Tennant's case Watermeyer AJP, having pointed out that there were English cases which seemed to lay down the rule that any publication commenting on pending proceedings was a contempt of court and that this rule had on a number of occasions apparently been adopted in South Africa, went on to say (at p 126):

"I am not however prepared to hold that any public comment upon a pending civil suit would constitute contempt of court; it seems to me that the comment must be of such a nature that it tends to interfere with the administration of justice."

Moreover, in the practical application of the "tendency" test our courts have evolved inter alia the following criterion: whether, if the facts etc set out in the publication concerned were to be accepted by the tribunal they could influence the proceedings before it. As will be seen, this criterion is not applied in English law in regard to proceedings before a judge.

Counsel for the appellant relied upon the decision

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of the House of Lords in *Attorney-General v Times Newspapers Ltd*

(1973) 3 All E R 54, in support of his submission that English law now adopts a less strict test for contempt of court in regard to pending proceedings than was previously the case. I do not find it necessary to analyse the speeches of the Law Lords in that case in any detail. It would appear that they were all of the view that, apart from a pre-judgment of issues, conduct does not constitute the form of contempt under consideration unless it presents a real risk of interference with the administration of justice. Lord Reid (at p 63) required a real risk as opposed to a remote possibility, and said that this was an application of the ordinary *de minimis* principle. In his view there was therefore no contempt, if the possibility of influence was remote. Lord Morris of Borth-Y-Gest (at p 67) stated that a court will only find contempt if the risk of prejudice is serious or real or substantial, but did not indicate that he disagreed with Lord Reid's views. Lord Diplock said (at p 75)

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that he agreed with Lord Reid that given conduct which presents a real risk as opposed to a mere possibility of interference with the due administration of justice, it is at the very least a technical contempt. Lord Cross of Chelsea (at p 84) commented that it is easy to see that any publication which prejudices an issue in pending proceedings ought to be forbidden if there is any real risk that it may influence the tribunal or a prospective witness, while Lord Simon of Glaisdale (at p 76) expressed concurrence with Lord Diplock's elucidation of the basis of the law of contempt of court and his analysis of its concepts.

It does not appear to me, however, that a new test was introduced by the *Times Newspapers*' case. In *Vine Products Ltd v Green* (1966) 1 Ch 484, to which reference was made by Ogilvie Thompson CJ in *Van Niekerk's* case, Buckley J said (at p 499) that the risk that conduct will prejudice the fair trial of an action must be a real risk, and in *R v Duffy and Others, Ex parte Nash*, (1960) 2 All E R

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891 at 896, Lord Parker CJ thought that there had to be a real risk, as opposed to a remote possibility, that the article concerned was calculated to prejudice a fair hearing. In both these cases it was accepted that a judge has by his training no difficulty in disregarding matter which is not evidence in the case before him, and that there is therefore generally no real risk that a judge will be influenced by the publication of such matter. As was pointed out by Ogilvie Thompson CJ in *Van Niekerk's* case, our courts have adopted a different test, and in particular have refrained from enquiring whether conduct would or would not be likely to influence a judge's mind. The fact that there was no risk that conduct would influence a judge, was consequently regarded as irrelevant; it sufficed if the conduct had the tendency to influence the pending proceedings. And, fully aware of the less strict test applied in English law, this court in *Van Niekerk's* case decided that the principle adopted by the earlier South

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African cases was a salutary one which should be maintained.

It should also be observed that the "real risk" test was not the only one considered in the Times Newspapers' case. It is indeed clear that at least the majority of the Law Lords were of the view that the prejudging of issues in pending proceedings constitute contempt of court even in the absence of any risk of prejudice to those proceedings. Thus, Lord Reid (at p 65) considered that the law would be clearer and easier to apply in practice if it was made a general rule that it is not permissible to prejudice such issues, whilst Lord Cross of Chelsea (at p 84) said that an absolute rule against prejudgment is necessary in order to prevent a gradual slide towards trial by newspaper or tele-vision. And Lord Diplock (at p 72) concluded that conduct which is calculated to prejudice the requirement that once a dispute has been submitted to a court of law there should be no usurpation of the function of the court to decide the dispute, is contempt of court.

43.

In my view the application of the "tendency" test in South African law and that of the "real risk" and "prejudgment" tests in English law would in by far the majority of cases lead to the same result. Indeed, it is difficult to conceive of a case where a prejudgment of a factual issue would not also tend to interfere with the administration of justice in the proceedings concerned. Conversely in most cases in which the "tendency" test is satisfied the conduct in question will "tend to interfere" precisely because it expressly or implicitly constitutes a prejudgment of an issue. Hence I do not think that in the result there is a substantial difference between the single test adopted in Van Niekerk's case and the dual test favoured in the Times Newspapers' case.

Counsel for the appellant rightly pointed out, however, that the "prejudgment" test was in effect abolished by the Contempt of Court Act (1981 Chapter 49). S 1 of the Act defines "the strict liability rule" as the rule of law

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whereby conduct may be treated as contempt of court as tend-ing to interfere with the course of justice in particular legal proceedings regardless of an intent to do so. S 2 (1) and (2) reads as follows:

"(1) The strict liability rule applies only in relation to publications, and for this pur-
pose "publication" includes any speech, writing, broadcast or other communication in whatever form,
which is addressed to the public at large or any section of the public.

(2) The strict liability rule applies only to a publication which creates a substantial risk that the
course of justice in the proceed-ings in question will be seriously impeded or prejudiced."

Sections 3, 4 and 5 further delimit the ambit of the strict liability rule, but for present purposes it suffices to draw attention to the fact that the Act has no application if a person commits an act with the intention of prejudicing the administration of justice in pending proceedings. This is made clear by s 6 (c) which provides that nothing in the foregoing provisions of the Act shall

/restrict ...

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restrict liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice. It is therefore only in the absence of intent that conduct cannot constitute contempt unless it creates the substantial risk required by s 2 (2).

As has been pointed out, mens rea is not an element of contempt of court in English law, or at least not of that form of contempt under consideration. On the other hand, an act done with the intention to interfere with the administration of justice is apparently regarded as contempt even in the absence of any risk of such interference; for instance, if a bribe is offered to a judge. See Borrie and Lowe, *The Law of Contempt*, 2nd ed, pp 64-5. Since in our law intention is generally an element of the offence, it would therefore appear that, even having regard to the "real risk" test, the English common law of contempt of court casts its net at least as wide as does South African law. The adoption of a stricter statutory test for contempt

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in England - but only within the context of the strict liability rule - can therefore offer but little guidance for the development of our own law.

The major reason for the enactment of the Contempt of Court Act was the decision of the European Court of Human Rights in *The Sunday Times v The United Kingdom* 2 E H R R 245, which, by a majority of 11 votes to 9, ruled that the injunction restored by the House of Lords in the *Times Newspapers*' case constituted a violation of Article 10 of the European Convention on Human Rights. In the majority judgment the main difference between the approach of the House of Lords and that of the European Court is expressed as follows (at pp 280-281); The House of Lords thought that a proper balancing of conflicting interests, viz the freedom of expression and the due administration of justice, required an absolute rule that it is not permissible to prejudge issues in pending cases. The European Court, on the other hand, was not faced with a choice

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between two conflicting principles, but with an overriding principle of freedom of expression that was subject to a number of exceptions which had to be narrowly construed. The protection of that principle was therefore the main concern and in order to safeguard it against undue encroachment any restrictions, including those pertaining to the administration of justice, had to be justified on the basis of a pressing social need.

South African courts are obviously free to strike a balance between the dictates of freedom of expression and those of the due administration of justice, and are not enjoined to regard freedom of expression as the superior or even primary principle. Hence I do not think that the decision of the European Court, and the resultant enactment of the Contempt of Court Act, afford a compelling reason for a reconsideration of the "tendency" test adopted by this court in Van Niekerk's case.

In passing it may be said that it seems to be

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implicit in that test that the conduct concerned should improperly tend to interfere with pending proceedings. Thus, a discussion in a law journal of legal issues decided in a case on appeal, would generally not constitute contempt of court. The same may be true of even factual discussions in scientific journals. See the Phillimore Report, *supra*, para 111.

I turn now to the question whether the articles which appeared in the Weekly Mail contained contemptuous matter, and I shall deal first with the article concerning the judge's notes. It will be recalled that the main ground upon which Van Dijkhorst J held that the article constituted contempt of court was that it falsely led the public to believe that he had acted irregularly by making his own notes available to the press, and that he had done so while the case was still being heard and without giving Counsel an opportunity to address the court on the correctness of the observations concerned. It appears, therefore,

49.

that the learned judge was of the view that the article constituted that form of contempt which is often called scandalising the court. I am unable to agree. In my view an ordinary reader of the article would simply not have entertained the notion that the judge had acted irregularly, and in particular that he had privately made his notes available to the press. At most such a reader with some knowledge of legal procedure may have considered the possibility that the press had surreptitiously obtained access to the notes. Notwithstanding the few unusual comments to which reference has already been made, most readers would, however, have assumed that the notes had in a regular manner become part of the record of the proceedings.

Van Dijkhorst J also found that the article was contemptuous in that it prejudged an issue in the case. Counsel for the appellants submitted that this finding was not substantiated and pointed out that the learned judge did not explain which issue he had in

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mind. The opening paragraphs of the article state, however, that the video film was shown by lawyers for the treason trialists in support of their contention that violence after a mass funeral in Evaton was the result of police action, and it would therefore seem that this contention became an issue in the case. There is no doubt that the notes portray the police in an unfavourable light and that they contain adverse comment on police activities during the September 1984 unrest in the Vaal townships. The article could consequently have had a profound influence on a prospective witness who read it. It is indeed not unlikely that the article may have discouraged such a person from giving evidence to the effect that police acts did not contribute to the unrest, or, more specifically, that the police did not commit unnecessary violence at the time of the funeral in Evaton. And I am in agreement with the view of Buckley J in *Vine Products v Green* (1966) Ch 484, 496,

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that a publication is contemptuous if it is:

"likely to interfere with the proper adducing of evidence in the case either by discouraging witnesses from coming forward or by influencing them in some way in the kind of evidence that they are prepared to give."

I have already found that the first appellant did not know, and did not foresee the possibility, that the notes had not been duly read into the record of the proceedings. It remains to be considered whether he was negligent. In this regard it must be borne in mind that when he commissioned the second appellant he suggested to her that she should approach Dison who acted as attorney for some of the accused. When he received her articles he would therefore have assumed that they were based upon information obtained from and transcripts

made available by Dison, as also on what was said in open court at the time she attended the trial. Under these circumstances a reasonable editor would have been satis-

fied that the notes had been incorporated in the record

52.

of the proceedings. The possibility that the judge had in an irregular manner made his notes available to the second appellant, or that she or anybody else had obtained access to his private notes without his consent, would simply not have occurred to a reasonable man in the position of the first appellant. Likewise, and again notwithstanding the comments underlined by me, he would not have given serious consideration to the only other possibility, i.e. that due to some inexplicable mistake the notes were in fact not the judge's notes. I am accordingly of the opinion that the first appellant's belief that the notes had been read into the record was not unreasonable and that he was wrongly convicted in regard to the article in question. But even if the first appellant should have been put on his guard, I do not think that his failure to make enquiries was

causally connected to his decision to publish the article. It is said that he ought to have
/entertained ...

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entertained a doubt whether the notes had been incorporated into the record and that he should have approached Dison, which would, of course, have been the obvious course to adopt under those circumstances. But it is clear from Dison's evidence that notwithstanding what he regarded as some "wry" comments (i.e. the comments underlined by me) he was convinced that the notes had been read into the record. It follows that had the first appellant approached Dison, he would have received the assurance that the notes were indeed the judge's formal observations. That, after all, was what Dison conveyed to the second appellant.

Van Dijkhorst J found that the relevant parts of the other two articles constituted contempt of court because they prejudged issues in the case and there is an absolute rule prohibiting such prejudgment. In this

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regard he expressed the view that trial by newspaper is intrinsically objectionable because it will lead to disrespect for the law, and that speculation about the outcome of a case will tend to lower the esteem in which courts are held. The learned judge concluded as follows:

"The sections of the reports referred to by me are in my view the type of speculative comment on the evidence, the weight thereof and the effect which it may or may not have on the outcome of the case which is an unwarranted and unacceptable interference with the due administration of justice."

Although, as has been pointed out, an application of the prejudgment test, on the one hand, and the tendency test, on the other, will in practice in most cases lead to the same conclusion, I cannot agree that there should be an absolute rule against the prejudging of issues in pending proceedings. For, as I have already said, a discussion in a law journal may prejudice such issues but probably would not tend to interfere improperly with

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the administration of justice. The real question therefore is whether the articles in question did tend to constitute such an interference.

In the article entitled "Commission Shuns 'Agitator' Thesis" mention was made of the fact that the report of the Van der Walt Commission was submitted, to the Government in March 1985 but was only tabled in Parliament towards the middle of April 1986. Having stated that the reason for the delay was a mystery, the author of the article remarked: "One wonders if the protracted Delmas trial might have taken a different route had the findings been made available earlier".

In my view this remark does not satisfy the tendency test. It seems to me that the author was merely posing the question whether the State would have prosecuted the accused in the same way and to the same extent as it actually did if the report had been made available earlier. In particular the remark could not

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have influenced the court or prospective witnesses even if its validity was accepted by them.

It is convenient to consider the remaining two sections of the articles together. In the first section it was said that the report of the Van der Walt Commission could have major implications for the 22 accused, and in the second section, appearing in an article head-lined "About Face from a Key State Witness", the following remark was made : "New evidence which could shake the State's case includes the following". Then three aspects of the evidence given at the trial were set out.

Although not without some hesitation, I agree with Van Dijkhorst J that the comments were contemptuous. In my opinion they constitute an improper speculation on the detrimental consequences that the report of the Van der Walt Commission and the new evidence may have on the State's case, and in effect suggest that the report and the evidence damaged that case.

Applying the criterion

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adopted in Van Niekerk's case it appears to me that if Van Dijkhorst J and his assessors were to accept that suggestion, it could influence the proceedings in the treason trial.

In his heads of argument counsel for the appellant submitted that the summary procedure followed by the court a quo was undesirable and in fact precluded a fair and dispassionate trial. In this court it was not contended, however, that the proceedings were irregular and it is accordingly unnecessary to consider the circumstances under which resort may or should be had to the summary procedure. But I may point out that this procedure was adopted in a number of cases and also by this court in MacKenzie's case.

Counsel for the appellants rightly refrained from contending that the appellants did not intentionally commit contempt of court in regard to the above two sections of the articles. In the result their convictions

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cannot be disturbed. If the comment relating to the "different route" of the "protracted Delmas trial" were contemptuous, it would have been so technical that the conviction of the appellants in regard thereto could not have had a significant effect on their sentences. It is clear, however, that Van Dijkhorst J regarded the article on the judge's notes as the most offensive of the three articles, and that he would have imposed a lighter sentence on the first appellant had he not applied the strict liability rule. Hence the first appellant's sentence should be altered as set out hereunder.

I would therefore dismiss the appeal save for substituting the following for the sentence imposed on the first appellant:

"Mr Anton Paul Harber is sentenced to a fine of R400 or two months' imprisonment. The whole of this sentence is suspended for a

/period ...

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period of two years on condition that he is not found guilty of contempt of court committed during the period of suspension."

H.J.O. VAN HEERDEN JA

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