[TRIAL AT BAR]

1954 *Present :* **Rose C.J., Gunasekara J. and Pulle J.**

THE QUEEN *v.* THEJAWATHIE GUNAWARDENE

Information No. 1 of 1954 exhibited in the Supreme Court by the Attorney-General

Informations—Power of Attorney-General to exhibit informations—Circumstances when informations may be presented—Criminal Procedure Code, s. 385.

Trial at Bar—Direction of Minister of Justice—Jurisdiction of Court to adjudicate upon its validity—" Disturbance of public feeling "—Test of its existence—How far justiciable—Criminal Procedure Code, s. 440A (1) and (2).

Information was exhibited by the Attorney-General against the defendant on August 5, 1954, charging her with criminal defamation in respect of a defamatory statement published on July 1, 1954, in a newspaper called "Trine", concerning a person who had held high office in Government for many years in various capacities and who, on the day previous to the date of publication of the statement, had ceased to hold office as Minister of Finance and was Governor-General designate. The alleged libel was to the effect that the Governor-General designate had been engaged in swindles on an international scale and that a public trial of the gang—of which presumably he was a member—was imperative.

On August 6, 1954, the Chief Justice received from the Minister of Justice a written communication dated the previous day and purporting to be a direction under Section 440A of the Criminal Procedure Code that the defendant should be tried at Bar by three Judges without a Jury.

Before defendant pleaded to the information her Counsel moved that the information be quashed on the ground that it was one which the Attorney-General could not validly exhibit, and also contended that the direction of the Minister of Justice was invalid.

Held, that if the Attorney-General in whom rested the discretion either to proceed by indictment or information took the view that the imputations which were the subject of the information tended to disturb or endanger the Government, it was impossible to hold, assuming that the Court had the power to review that discretion, that that view was wrong. The speedy process of information was designed not to vindicate the personal honour of the officer libelled but to counteract what was essentially a public mischief. In the circumstances the Attorney-General had the power under Section 385 of the Criminal Procedure Code to file the information, and the application to quash it must accordingly fail.

Quaere, whether in any event the Court had the power to quash an *ex officio* information ?

Held further, (i) that the Court had jurisdiction to adjudicate upon the question whether the direction given by the Minister of Justice was a valid direction in the sense that it complied with the requirements of Section 440A of the Criminal Procedure Code. The circumstance that the Minister had purported to direct that the information " shall be tried before the Supreme Court at Bar by three Judges without a Jury " did not have the effect that a Bench of three Judges which assembled to hear the information ceased to be the Supreme Court and became a different tribunal created by the Minister.

(ii) that there was no requirement to give the Minister of Justice an opportunity of being heard in support of the direction given by him.

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(iii) (by the majority of the Court) that in a case of disturbance of public feeling, before the Minister of Justice proceeds under Section 440A (1) (*b*) to the consideration of the question as to whether the matter is appropriately triable by three Judges without a Jury there must be reasonable grounds for his belief that there is a disturbance of public feeling. The sole test to be applied in such a case is whether, in the opinion of the Court, a reasonable man occupying the seat of the Minister could reasonably come to the conclusion that there existed a disturbance of public feeling.

(iv) (by the majority of the Court) that the principle *omnia praesumuntur rite esse acta* was applicable to the Minister's order.

(v) that the phrase " disturbance of public feeling " was not (in the opinion of the majority of the Court) limited to cases where there was an open manifestation of public feeling. One of the tests which could be applied to determine whether or not a disturbance of public feeling exists would be to consider the reactions to the matter in question of the ordinary citizen in various walks of life. Applying that test in the present case, the question as to whether there was reasonable ground for the belief that there existed a disturbance of public feeling in consequence of the publication of the defamatory statement should be answered (by the whole Court) in the affirmative.

ORDER made in respect of preliminary objections taken to a trial at Bar upon information exhibited by the Attorney-General. The facts appear from the head-note.

D. N. Pritt, Q.C., with *Izadeen Mohamed, A. S. Vanigasooriar, L. Muttutantiri* and *F. R. Dias*, for the defendant.—My preliminary objection is really in the form of a " double motion " seeking to deprive the Crown of both its advantages, viz. : trial at Bar by 3 Judges without a Jury and proceedings by Criminal Information.

(1) The direction by the Minister of Justice under Section 440A of the Criminal Procedure Code must be quashed. In the first place it must be borne in mind that Section 440A was introduced into the Statute Book to meet a particular situation, the disturbances of 1915. The section must therefore be construed in the light of the circumstances that obtained at *that* time. The Court can take judicial notice of those circumstances and can even make reference to the proceedings of the Legislative Council during the debate on this amendment to the Criminal Procedure Code. Those circumstances were extraordinary circumstances and it is only in similar circumstances that the powers conferred in the Executive by this Section were intended by the Legislature to be invoked. It cannot even be suggested that the country found itself in any such situation at the time of the Minister's direction in this case, viz. August, 1954.

Secondly, the words of the Section must be interpreted strictly. Section 440A (1) (*b*) provides that " in the case of any other offence" (i.e. any offence other than an offence under Section 120 of the Penal Code) " which by reason of civil commotion, disturbance of public feeling or any other similar cause, the Minister of Justice may consider to be appropriately triable in the manner in this section provided, the Minister of Justice may direct . . . . ". It is submitted that before the Minister can make a direction under this section there must exist *in fact* some " civil commotion, disturbance of public feeling or any other similar cause ".

Thereafter, the Minister must consider whether the offence is " appropriately triable " as provided. Those are the two requirements of the section.

As regards the first requirement, " any other similar cause " must be read " *ejusdem generis* " with " civil commotion, a disturbance of public feeling ". The Crown must prove the existence, in fact, of such circumstances at the relevant time. On a proper interpretation of Section 440A (1) (*b*), those are matters the existence of which must be established to the satisfaction of the Court. The Court has jurisdiction to enquire into that question as it is a necessary and essential pre-condition to the valid exercise of the Minister's powers. The question of whether or not there existed in fact " civil commotion, disturbance of public feeling or any other similar cause " is a " justiciable " or " judiciable " issue and not one on which the Minister and he alone must decide. This view is supported by the decisions in *Liversidge v. Anderson* [1]; *R. v. Halliday* [2]; *Eshekbye Eleko v. Officer Administering the Government of Nigeria* [3] and the Ceylon cases of *Bracegirdle* [4]; *Nakkuda Ali v. M. F. de S. Jayaratne* [5] and *M. F. de S. Jayaratne v. Miya* [6]. The case of *Liversidge v. Anderson*, which is now regarded as a leading case, upon close analysis supports the above contention. The facts in that case were totally different and though the actual decision in that case is based on those particular facts, the principle on which the House of Lords arrived at the decision is now well established.

If this view is acceptable, then the Court must have evidence placed before it of the existence of " civil commotion, disturbance of public feeling or any other similar cause ". What is " civil commotion " ? There must be violence and tumult—see *Cooper v. General Accident Assurance Corporation* [7]; *Levy v. Assicurazioni Generali* [8]; *Motor Union Insurance Co. v. Boggan* [9]. For " disturbance " see *Tillmans & Co. v. Steamship Knutsford Co.* [10]. The defence is under no obligation to prove the *non*-existence of any such circumstances. The Crown must satisfy the Court of the existence of such circumstances. There is no evidence at all, so far, placed before the Court that at the time of the Minister's direction there was, in fact, any of these conditions existing.

The second requirement of Section 440A (1) (*b*) is that the Minister must consider that the offence is appropriately triable as provided. The word " consider " must mean " hold the view ". That is a matter for the Minister's sole discretion and the Court has no jurisdiction to question the Minister's conclusions. The Minister must give his mind (i.e. consider) and must come to a conclusion. In this case there is no evidence before Court that the Minister has " considered " in the sense that he gave his mind to it and arrived at a conclusion. The instrument signed by the Minister does not state that he had given his mind to it and was satisfied that this was a case appropriately triable without a Jury. The direction signed by the Minister is a bald direction *simpliciter*.

[1] *(1942) A. C. 206.*
[2] *(1917) A. C. 260.*
[3] *(1931) A. C. 662.*
[4] *(1937) 39 N. L. R. 193.*
[5] *(1950) 51 N. L. R. 457.*
[6] *(1951) 52 N. L. R. 249.*
[7] *(1922) 128 L. T. 481.*
[8] *(1940) A. C. 791.*
[9] *(1923) 130 L. T. 588.*
[10] *(1908) 24 T. L. R. 454.*

[To Rose C.J.: The doctrine *omnia praesumuntur rite esse acta* can only be applied if it is established that the Minister did bring his mind to bear on the matter.]

Finally, the Minister's direction is bad on the face of the instrument. It does not state that there exists in fact any "civil commotion, disturbance of public feeling or any other similar cause". Nor does it state that by reason of any one of these the Minister considers this to be a case appropriately triable under Section 440A.

[To Rose C.J.: Even if the direction had stated "whereas I am satisfied" it still would not affect my principal submission that it is the *Court* and *not the Minister* that must be satisfied as to the existence of civil commotion, &c.]

The doctrine *omnia praesumuntur rite esse acta* will not apply in a case where a document is *ex facie* bad or invalid.

Summary (i) There must have existed, in fact, a "civil commotion, disturbance of public feeling or other similar cause"—Whether or not these existed is a matter for the Court to decide on evidence.

(ii) The Minister must bring his mind to bear on the question whether—once it has been established that there is civil commotion, &c.—the case is one for trial under Section 440A.

(iii) The Minister's direction must bear on the face of it a statement that he did so consider the matter.

[To Gunasekara J.: It is conceded that if the Minister's direction is bad, that does not mean that the Attorney-General's Information must necessarily be quashed. That is another matter.]

(2) The information exhibited by the Attorney-General must be quashed.

The only section which empowers the Attorney-General to exhibit a Criminal Information is Section 385 of the Criminal Procedure Code. That section enables the Attorney-General to exhibit criminal informations only for those purposes for which the Attorney-General in England may exhibit informations on behalf of the Crown in the High Court and for no other. The word used is "purposes" and not "offences". For the purpose for which this procedure is resorted to in England—see Short & Mellor on Crown Office Practice. The information in this case nowhere states what the purpose is for which it has been exhibited.

[To Rose C.J.: It is conceded that the meaning of the word "purposes" in the section is somewhat difficult. It could mean "objects".]

Secondly, the Courts in England act strictly in giving leave to bring criminal informations—see Blackstone's Commentaries, Vol. 4, Ch. 23, and *R. v. Labouchere* [1]. The cases in England where criminal information procedure has been resorted to are generally cases of sedition e.g. *R. v. Cobbett* [2]; *R. v. Horne* [3]; *R. v. Burdett* [4].

[1] *(1882) 12 Q. B. D.*
[2] *29 Howe's St. Tr. 1.*
[3] *20 Howe's St. Tr. 651.*
[4] *3 B. Ald. 717.*

[To GUNASEKARA J. : Archibold in his treatise on Criminal Pleading does mention a case in which the offence related to a vast fraud in respect of a Bank—i.e. *R. v. Brown et al.* [1].]

[To ROSE C.J. : In the case of *R. v. Mylius* in 1911 no objection was raised to the use of the procedure by Criminal Information.]

Thirdly, *ex officio* informations are exhibited only where the Sovereign herself or her Ministers are libelled for such " enormous misdemeanours " as tend to interfere with the exercise of royal functions or tend to endanger the Government. In this case, on the 1st of July Sir Oliver Goonetilleke was a mere private person. There is no office known as " Governor-General Designate ". In this case procedure by Information is unwarranted and the Information should be quashed.

H. H. Basnayake, Q.C., Attorney-General, with *T. S. Fernando, Q.C.*, Solicitor-General, *V. S. A. Pullenayagam, N. T. D. Kanakaratne* and *R. S. Wanasundera*, Crown Counsel, for the Crown.—My first submission is really a kind of preliminary objection to the preliminary objection raised by Counsel for the defence, that is that the Minister's direction cannot be questioned in *these* proceedings and that this Court has no jurisdiction to consider its validity. That submission is based on the following grounds—(1) The Minister's direction under Section 440A of the Criminal Procedure Code is the sole authority for the trial of the defendant by three Judges without a Jury. The original jurisdiction of the Supreme Court is to be found exclusively in Sections 19, 29, 42 and 45 of the Courts Ordinance. There is no " inherent " jurisdiction apart from the Statute —see *Mohamado v. Ibrahim* [2] ; *In re Election of a Member for the Local Board of Jaffna* [3] ; *Deonis v. Samarasinghe* [4]. The only power for three Judges of the Supreme Court to try a person without a Jury is therefore derived from the Minister's direction and the Judges who assemble in pursuance of that direction have no jurisdiction to go into its validity and make any pronouncement thereon.

[To ROSE C.J. : If the Minister's direction be illegal the defendant must seek his remedy elsewhere—perhaps by way of habeas corpus proceedings or appeal to the Court of Criminal Appeal (see Court of Criminal Appeal Ordinance Section 5 (4).]

The Court cannot examine the very instrument which brought it into existence. (2) The direction made by the Minister cannot be questioned in these proceedings. It can be questioned, if at all, only in proceedings to which the Minister is a party. The Minister is not a party to these proceedings. To declare the Minister's direction invalid or bad without giving him an opportunity of being heard would be a violation of the rules of natural justice. In all the English cases where similar Ministerial directions have been questioned the Minister has been made a party, e.g. : *R. v. Inspector of Lehman Street Police Station, ex p. Venicoff* [5] ; *O'Brien v. Home Secretary* [6] ; *R. v. Home Secretary, ex p. Bressler* [7] ;

[1] (1858) 7 Cox. C. C. 442.
[2] (1895) 2 N. L. R. 36.
[3] (1907) 1 A. C. R. 128.
[4] (1911) 15 N. L. R. 39.
[5] (1920) 3 K. B. D. 72.
[6] (1923) A. C. 603.
[7] (1924) 131 L. T. 386.

Stuart v. Anderson[1] ; *R. v. Governor of Brixton Prison, ex p. Pitt Rivers*[2] ; *R. v. Home Secretary ex p. Budd*[3] ; *Liversidge v. Anderson*[4] ; *Point of Ayr Collieries Ltd. v. Lloyd George*[5] ; *Carltona Ltd. v. Commissioners of Works*[6] ; *Amand v. Home Secretary*[7] ; *Robinson v. Minister of Town and Country Planning*[8] ; *Johnson & Co. v. Minister of Health*[9] ; *Franklin v. Minister of Town & Country Planning*[10] . The only cases in which the Minister has not been made a party are cases where it was not the validity of his order which was questioned, but the validity of the law itself as in *R. v. Halliday*[11] ; *R. v. Governor of Brixton Prison, ex p. Savarkar*[12] ; *R. v. Inspector of Vine Street Police Station, ex p. Liebmann*[13] ; *R. v. Governor of Lewes Prison, ex p. Doyle*[14] ; *R. v. Governor of Wormwood Scrubs Prison*[15] ; *R. v. Superintendent of Chiswick Police Station, ex p. Sacksteder*[16]. (3) The statute provides for no appeal from the Minister's direction. To hear objections amounting to an appeal from the direction would amount to the assumption of an unwarranted jurisdiction. The Court cannot act as an appellate body and review the Minister's direction. *R. v. Home Secretary, ex p. Lees*[17] ; *Stuart v. Anderson*[18].

My second submission—assuming, without conceding, that the Judges who assemble in pursuance of the Minister's direction *can* go into the validity of that direction—is that the Minister's direction is valid and regular. He undoubtedly has the power to make the order he purports to make. The order cites the provision of law under which he purports to act and the order is under his own hand. Such an order is valid and regular—see *Point of Ayr Collieries Ltd. v. Lloyd George*[19] ; *Liversidge v. Anderson*[20] ; *R. v. Home Secretary, ex p. Lees*[21] ; *Stuart v. Anderson*[22] ; *El Dabbah v. A. G. for Palestine*[23]. Where a Minister makes a direction in which he cites the statutory power under which he is acting and signs it the presumption is that he has complied with all the conditions requisite for the making of such a direction. The maxim *omnia praesumuntur rite esse acta* applies. See Evidence Ordinance Section 114 Illustration (*d*); *R. v. Reynolds*[24] ; *Bhagat Singh v. Emperor*[25] ; *Vallibhai Ibrahim v. Emperor*[26] ; *Liversidge v. Anderson*[27]. The onus of rebutting this presumption is on the Defendant—see *Greene v. Home Secretary*[28] ; *Liversidge v. Anderson*[29] ; *Point of Ayr Collieries Ltd. v. Lloyd George*[30].

My third submission is that the words of Section 440A (1) (*b*) must be given their natural meaning—that is the cardinal principle of interpretation. The words must be construed as they would have been construed on the day the provision was introduced. On a natural construction of the

[1] *(1941) 2 A. E. R. 665.*
[2] *(1942) 1 A.E.R. 207.*
[3] *(1942) 1 A. E. R. 373.*
[4] *(1942) A. C. 206.*
[5] *(1943) 2 A. E. R. 546.*
[6] *(1943) 2 A. E. R. 560.*
[7] *(1943) A. C. 147.*
[8] *(1947) 1 A. E. R.851.*
[9] *(1947) 2 A. E. R. 395.*
[10] *(1948) A. C. 87.*
[11] *(1917) A. C. 260.*
[12] *(1910) 2 K. B. 1056.*
[13] *(1916) 1 K. B. 268.*
[14] *(1917) 2 K. B. 254.*
[15] *(1920) 2 K. B. 305.*
[16] *(1918) 1 K. B. 578.*
[17] *(1941) 1 K. B. D. 72, at 84.*
[18] *(1941) 2 A. E. R. 665, at 670.*
[19] *(1943) 2 A. E. R. 546, at 548.*
[20] *(1942) A. C. 206.*
[21] *(1941) 1 K. B. D. 72, at 78.*
[22] *(1941) 2 A. E. R. 665, at 669.*
[23] *(1944) A. C. 156 at 163.*
[24] *(1893) 2 Q. B. D. 75.*
[25] *(1931) A. I. R. (P.C.) 111.*
[26] *(1933) A. I. R. (Bombay) 79.*
[27] *(1942) A. C. 206, at 225.*
[28] *(1942) A. C. 284, at 295.*
[29] *(1942) A. C. 206, at 225.*
[30] *(1943) 2 A. E. R. 546, at 547.*

section it seems clear that the Legislature has made the Minister the sole Judge of the matters that should be decided before a direction under that section is made. The jurisdiction of the Court has been excluded. It would be unthinkable that the Legislature would have created such an unpractical and impracticable situation as to make the Court decide, on evidence, whether or not there existed in fact a civil commotion, disturbance of public feeling, &c. It is submitted that this is not a "justiciable" issue. Similar words in other cases have received the interpretation contended for by the Crown in this case—see *Bhagat Singh v. Emperor*[1]; *Liversidge v. Anderson*[2]; *Emperor v. Sarma*[3]. The entire trend of judicial decisions today in interpreting words giving similar powers to Ministers is in support of this contention—*Point of Ayr Collieries Ltd. v. Lloyd George*[4]; *Carltona v. Commissioners of Works*[5]; *Robinson v. Minister of Town & Country Planning*[6]; *Franklin v. Minister of Town and Country Planning*[7]. Nor is this rule of construction restricted to times of emergency only—see *Wijesekera v. Festing*[8]; *Robinson v. Minister of Town & Country Planning*[9]. It was conceded by Defence Counsel that the Court cannot go into the reasons for the Minister considering this a case "appropriately triable" as provided, once the existence of the pre-conditions is proved. It was sought to split the section into one part subject to the "objective" test and into another subject to the "subjective" test. The section cannot thus be split up so as to enable the Court to look into one part and not the other—see *Liversidge v. Anderson*[10].

It is finally submitted on the first motion that it is only when the Minister's good faith has been questioned that the Courts would investigate the grounds for or the reasonableness of the Minister's direction. In this case the Minister's *bona fides* has not been questioned. All the Court can do is to see whether the power the Minister claims to exercise is one which falls within the four corners of the statutory provision.

[The Attorney-General then distinguished the cases cited by Mr. Pritt as being inapplicable to the issue now being argued]. *Nakkuda Ali's* case (followed in *Mohamed Miya's* case) has to be considered on its particular facts. The Textile Control Regulation there considered was one of a number of regulations which formed part of a vast wartime control scheme. The only principle to be derived from that decision is that each set of words must be interpreted in their context without overdue reference to generalisations. In *Edurkbayi Eleko v. Officer Administering the Government of Nigeria*[11], the question that had to be considered by the Governor was a "judiciable" issue, viz.: whether or not the petitioner was a Native Chief and whether or not he was deposed. The Courts undoubtedly had a right to review the Governor's decision in that case. In the *Bracegirdle case*[12], the question of whether or not a state of emergency existed was never in issue so that the question whether the Governor's opinion as to the existence of such a state of emergency could be canvassed before the Court never arose in that case.

[1] *(1931) A. I. R. (P.C.) 111.*
[2] *(1942) A. C. 206.*
[3] *(1945) A. C. 14.*
[4] *(1943) 2 A. E. R. 546.*
[5] *(1943) 2 A. E. R. 560.*
[6] *(1947) 1 A.E.R. 851.*
[7] *(1948) A. C. 87.*
[8] *(1919) A. C. 646.*
[9] *(1947) 1 A. E. R. 851.*
[10] *(1942) A. C. 206, at 221.*
[11] *(1931) A. C. 662.*
[12] *(1937) 39 N. L. R. 193.*

Coming now to the objection regarding procedure by way of Criminal Information. In the first place this Information is well within the powers conferred on the Attorney-General by Section 385 of the Criminal Procedure Code. The word " purposes " in that section can only mean " objects " if the section is to have any meaning at all. The objects for which the Attorney-General in England can exhibit *ex officio* Informations are fully set out in a number of treatises—see *Blackstone's Commentaries* Vol. IV, p. 308–309, *Bacon's "Abridgment"* Vol. IV, p. 402–404, *Cole's " Informations "* p. 9–10, 12–13 ; *Wood Renton's " Encyclopoedia of the Laws of England,* Vol. VII. Libels on the Sovereign and on her Ministers and Judges are clearly one class of such objects. In England the last occasion on which an " ex officio " Information was exhibited was for a libel on H. M. King George V—*R. v. Mylius,* [1911], *Times* of 11.2.1911. In Ceylon, Informations were exhibited in a sedition case in *R. v. Sirisena* in 1917 and in the *Bo-Tree Case* in 1929. Though technically not a Minister on July 1st, 1954, Sir Oliver Goonetilleke can by no means be described as a private person. He had been appointed to succeed Lord Soulbury. The Information procedure was therefore proper in this case. *R. v. Brown*[1] shows that in England Information was used even in cases where private individuals were affected, but in a way amounting to a public scandal.

Secondly, the Court will not quash an " *ex officio* " Information—see *Bacon's "Abridgment"* Vol. IV, p. 404 ; *Blackstone's " Commentaries "* Vol. IV, p. 262 ; *Cole's " Information "* p. 70 ; *Holt's " Law of Libel "* p. 104. Also *R. v. Abraham*[2] ; *Prynne's Case*[3] ; *R. v. Nixon*[4].

D. N. Pritt, Q.C., replied.—Any Court in every case has power to consider the question of its jurisdiction to hear the matter before it. There is no difference in a case where the question relates to the very creation of the Court. There is an inherent power in the Court to entertain a plea to jurisdiction—*R. v. City of London &c. Rent Tribunal, ex p. Honig*[5] ; *R. v. Jameson*[6] ; *R. v. Wilson*[7] ; *In re s.s. " Arnaldo da Brescia "*[8]. It is not necessary that the Minister should be made a party in a case where his direction is to be considered. The *Audi alteram partem* rule presupposes a " lis " between parties. Here, there is no such " lis "—it is analogous to a Judge's order being reviewed by a Court of Appeal without that Judge being made party to the appêllate proceedings.

The maxim *omnia praesumuntur rite esse acta* is not applicable in this case. It applies only where there is evidence that an act has been done. The rule of presumption is not that an act has been done but that where it is proved that an act has been done, it is presumed to have been done properly—see Monir on Evidence, p. 866. Also *Gwilt v. Emperor*[9] ; *Harjiran Shah v. Emperor*[10].

As regards the actual interpretation of the words of Section 440A (1) (*b*), the words must be examined in their context. " Disturbance of public feeling " can mean a " simmering " of public feeling as opposed to an

[1] *(1858) 7 Cox C. C. 442.*
[2] *(1698) 90 E. R. 392.*
[3] *(1689) 87 E. R. 764.*
[4] *(1705) 93 E. R. 462.*
[5] *(1951) 1 A. E. R. 195.*
[6] *(1896) 2 Q. B. D. 425.*
[7] *(1846) 6 Q. B. 620.*
[8] *(1922) 23 N. L. R. 391.*
[9] *(1945) A. I. R. (Bomb.) 368.*
[10] *(1946) A. I. R. (Bomb.) 492.*

actual " boiling over ", e.g. the recent constitutional and political crisis in Pakistan may be regarded as having led to a disturbance of public feeling. Similarly in Great Britain the abdication crisis resulted in a disturbance of public feeling. The onus of establishing the existence of any such phenomenon is on the Crown—see Sections 101,103 and 106 of the Evidence Ordinance. Also *R. v. Halliday* [1].

The decision in *Liversidge v. Anderson* [2] must be restricted to the facts and circumstances of that case. It would be improper to attempt to derive from that judgment a general principle of interpretation—see Lord Radcliffe's view on *Liversidge's case* in *Nakkuda Ali v. Jayaratne* [3]. These special matters must be remembered when considering *Liversidge's case*—(1) it was a period of grave national emergency, (2) the information on which the Home Secretary purported to base his decision was of a highly confidential nature, (3) the grounds for the Home Secretary's action were therefore quite unsuitable for consideration in a Court of Law. It is submitted that too much must not be sought to be gained from that decision. The Indian cases cited by the Attorney-General—*Bhagat Singh v. Emperor* [4] and *Emperor v. Sarma* [5]—were both cases dealing with total powers conferred on the Governor-General to act in times of emergency.

D. S. Jayawickreme, Q.C., with *Stanley de Zoysa*, watched the interests of the " Free Press of Ceylon ".

Cur. adv. vult.

November 9, 1954.

The following is the order of the Court :—

The defendant has appeared before this court to answer a charge of criminal defamation alleged against her in an information exhibited by the Attorney-General on the 5th August, 1954. The information alleges that on or about the 1st day of July, 1954, the defendant defamed Sir Oliver Goonetilleke, then Governor-General designate, by publishing in an issue of a newspaper called " Trine " a statement, *inter alia*, to the effect that he had been engaged in swindles on an international scale and that a public trial of the gang—of which presumably he was a member—was imperative. On the 6th August the Chief Justice received from the Minister of Justice a written communication dated the previous day and purporting to be a direction under Section 440A of the Criminal Procedure Code that the defendant should be tried at bar by three

[1] *(1917) A. C. 260, at p. 273.*
[2] *(1942) A. C. 206.*
[3] *(1950) 51 N. L. R. 457.*
[4] *(1931) A. I. R. (P.C.) 111.*
[5] *(1945) A.C. 14.*

Judges without a Jury. The defendant's counsel moves that the information be quashed and also contends that the Minister's direction is invalid.

An order quashing the information is asked for on the ground that it is one which the Attorney-General could not validly exhibit. It was submitted that if one examines the purposes for which the Attorney-General in England may, *ex officio*, exhibit an information, the present information falls outside those purposes. In particular it was urged that on the date of the alleged libel, namely, the 1st July, 1954, Sir Oliver Goonetilleke was not the Governor-General, that he did not hold any high office and that he was not part of the apparatus of Government and that, therefore, the imputations published only affected him as a private citizen which might well be the subject of an ordinary criminal or civil suit but not justifying recourse to the extraordinary procedure by way of information *ex officio*.

The Attorney-General contended that the information filed against the defendant was within the powers conferred on him by Section 385 of the Criminal Procedure Code, that a motion to quash an *ex officio* information could not be entertained in these proceedings and that, in any event, a court has no power to quash such an information.

It may perhaps be helpful to state here that immediately prior to 1st July, 1954, Sir Oliver held high office in Government for many years in various capacities. On the 21st April, 1954, an official announcement was made that he would succeed Lord Soulbury in the Office of Governor-General. On the 24th June, 1954, a Commission was issued under Her Majesty's Sign Manual and Signet appointing him to that office. The Commission further provided that upon his taking the prescribed oaths and entering upon the duties of his office it should supersede the Commission appointing Lord Soulbury. Sir Oliver was sworn in as Governor-General on the 17th July, 1954.

Section 385 of the Criminal Procedure Code confers on the Attorney-General the power to proceed by information in the like circumstances in which the Attorney-General of England would have the right to exhibit an information, subject to the limitation that while the *ex officio* information in England is confined to misdemeanours, in Ceylon the class of offences is limited with reference to the punishment provided for them. We would point out that while in England the procedure by way of private information has been abolished comparatively recently, the powers of the Attorney-General to exhibit informations, *ex officio*, remain unaffected. This procedure is no doubt intended to apply to those exceptional circumstances, to which we will in a moment refer, in which it is desirable that the machinery of the criminal law should be put swiftly in motion. A number of commentaries and cases dealing with the power of the Attorney-General in England to file *ex officio* informations have been read to us. We do not think it necessary to

refer to them because their result is conveniently summarized in Archbold's Criminal Pleading, 33rd edition, page 115, in the following words:

"The usual objects of an information *ex officio* are properly such enormous misdemeanours as peculiarly tend to disturb or endanger the King's Government, or to molest or affront him in the regular discharge of his royal functions, such, for instance, as . . . . libels upon the King or His Ministers, the Judges or other high Officers, reflecting upon their conduct in the execution of their official duties."

We do not think that there is substance in the argument that because on the 1st July, Sir Oliver was not holding the Office of a Minister and had not then entered upon the duties of the Office of Governor-General, to which he had been appointed by the Commission dated the 24th June, he falls outside the class of persons described as "other high officers" in the passage cited from Archbold. It has to be remembered that the imputations which are the subject of the information are, at least by implication, a grave reflection on the very Government the Head of which was responsible, while Sir Oliver was still a member of it, for advising Her Majesty to appoint him to the highest office in the country. If the Attorney-General in whom rests the discretion either to proceed by indictment or information takes the view that the imputations tend to disturb or endanger the Government, it seems to us that it is impossible to hold, assuming that we have the power to review that discretion, that that view is wrong.

No case raising a point similar to the one with which we are presently concerned has been cited. Nevertheless we presume that the common law of England under which the Attorney-General of that country acts in presenting informations *ex officio* can adapt itself to varying circumstances which come within the ambit of the principle; so that the present matter would not seem to be excluded from the speedy process by way of information, which process is not designed to vindicate the personal honour of the officer libelled but to counteract what is essentially a public mischief.

The case of *Reg. v. Brown and others*[1] would seem to be in point. In that case the directors of a joint stock bank were tried by a jury on an *ex officio* information filed by the Attorney-General charging them with conspiracy to defraud the public by false representation. They were convicted and before passing sentence Lord Campbell, C.J., pointed out at page 452 that the information was properly filed by the Attorney-General because the matter alleged was not a mere breach of contract with the shareholders or customers of the bank but amounted to a criminal conspiracy inevitably leading to a great public mischief.

Although it may be technically correct to say that Sir Oliver did not hold high office between the 30th June when he resigned from the Office of Minister of Finance and the 17th July when he was sworn in as Governor-General, it seems to us that for the purpose which we are now considering it would be no less mischievous to defame the Governor-General designate than to defame the Governor-General himself.

[1] *7 Cox C. C. 442.*

We are of the opinion for the reasons stated that the Attorney-General had the power under Section 385 of the Criminal Procedure Code to file the information and the application to quash it must accordingly fail. We need not, therefore, answer the subsidiary question whether in any event the court has the power to quash an *ex officio* information.

We now come to consider the defence contention that the Minister's direction is invalid. Sub-sections (1) and (2) of Section 440A of the Criminal Procedure Code as originally enacted read as follows :—

" (1) In the following cases, that is to say—

(*a*) in the case of any offence under Section 120 of the Penal Code (hereinafter, unless the context otherwise implies, referred to as ' sedition ') ;

(*b*) in the case of any other offence which by reason of civil commotion, disturbance of public feeling, or any other similar cause, the Governor may consider to be appropriately triable in the manner in this section provided,

the Governor may, by warrant under his hand, direct that the person charged shall be tried before the Supreme Court at Bar by three Judges without a Jury.

(2) A trial under this section may be held either upon indictment or upon information exhibited by the Attorney-General and the limitations of Section 385 shall not apply to any information so exhibited. " By a proclamation issued by the Governor on the 18th September, 1947, in pursuance of powers vested in him by Section 88 (1) of the Ceylon (Constitution) Order-in-Council, 1946, the words " Minister of Justice " were substituted for the word " Governor " in Section 440A (1) and the words " by warrant under his hand " were omitted.

Under the law as it stood prior to the enactment of Section 440A a person appearing before the Supreme Court to answer a charge alleged in an indictment or information filed by the Attorney-General was entitled to a trial by jury. Where the charge was contained in an indictment he was entitled to notice of the evidence against him and an opportunity of dealing with that evidence before his committal for trial. While he did not have this latter right where the charge was contained in an information, the Attorney-General's right to exhibit informations was a very limited one. As we have already stated, by reason of the provisions of Section 385 he could do so only for purposes for which the Attorney-General of England could exhibit informations on behalf of the Crown in the High Court and only for offences not punishable by death or by rigorous imprisonment for three years or upwards. Section 440A made a fundamental change in the law in that it empowered the Governor, and now the Minister of Justice, to take away from an accused person appearing before the Supreme Court for trial on indictment or information both his right to a trial by jury and his right not to be tried summarily

and without prior notice of the evidence against him for any offence punishable by death or by rigorous imprisonment for three years or upwards. Mr. Pritt contends that what purports to be a direction made by the Minister under this section is not a valid direction, and that therefore the defendant is not deprived of her right to a trial by jury in the event of the information not being quashed.

The Attorney-General raises an objection to our considering this contention. His submissions in support of his objection he has formulated, both orally and in writing, in the following terms :—

" 1. The direction under Section 440A of the Criminal Procedure Code is the sole authority for the trial of the defendant by three Judges without a Jury. The Judges who assemble in pursuance of that direction have no jurisdiction to go into its validity and make any pronouncement thereon.

2. Any order made without jurisdiction would be a nullity.

3. The direction of the Minister cannot be questioned by the defendant in these proceedings. It can be questioned, if at all, only in appropriate proceedings to which the Minister is a party. The Minister is not a party to these proceedings.

4. To declare the Minister's direction invalid or bad without giving him an opportunity of being heard would be a violation of the rules of natural justice.

5. The statute provides for no appeal from the Minister's direction. To hear objections amounting to an appeal from the direction would amount to the assumption of an unwarranted jurisdiction.

6. The Judges who assemble in pursuance of the Minister's direction can make a binding order only when they act within their authority. "

Elaborating the first of these submissions the learned Attorney-General argued that this Bench is a tribunal whose jurisdiction is derived solely from the Minister's direction and that it has no powers other than those given to it by that direction. The basis of the submission that this is not a tribunal which has jurisdiction to adjudicate on the validity of the direction is that it is a special tribunal created by the direction itself. It seems to us that this view is clearly erroneous. Whatever may be said about the soundness of the contention as regards the jurisdiction of a special tribunal created by a direction given by the executive, we would point out that we constitute a Bench of the Supreme Court and not such a tribunal. The circumstance that the Minister has purported to direct that an information " shall be tried before the Supreme Court at Bar by three Judges without a jury " does not, in our opinion, have the effect that a bench of three Judges which assembles to hear the information ceases to be the Supreme Court and becomes a differen tribunal created by the Minister. After the defendant has pleaded to the

information such a bench can try it with or without a jury according as there is not or is a valid direction in terms of Section 440A of the Criminal Procedure Code. Obviously the Court must be satisfied that there is such a direction before it can dispense with a jury, and therefore must have jurisdiction to decide that question. Indeed, the learned Attorney-General conceded that that question must be decided, but he contended that it must be decided by the Chief Justice upon the receipt of the Minister's direction, before a bench of three judges assembles. Once they assemble, according to the Attorney-General's argument, they must try the information without a jury even though they may be of the view that the Minister's direction is invalid and they therefore have no jurisdiction so to try it. We need say no more than that an objection to the jurisdiction of a court can be taken at any time. Moreover, such an objection " is one which the court itself is bound to take, providing its attention is called to it " : *Upper Agrigg Assessment Committee v. Gartsides (Brookside Brewery), Ltd.*[1]. We are unable to accept the contention that this Bench cannot adjudicate on the validity of the direction.

The proposition that any order made without jurisdiction would be a nullity is, of course, unexceptionable ; but nothing would seem to flow from it in view of our decision on the first submission.

Many cases were cited by the Attorney-General as supporting the third submission, that the validity of the Minister's direction cannot be questioned except in proceedings to which the Minister is a party. But they were all cases in which a party asked for relief against a Minister ; such as an application for a writ of *habeas corpus* or an action for damages for false imprisonment where it was alleged that a person was detained upon an illegal order by a Minister, or an action in respect of property alleged to have been illegally requisitioned by a Minister. No relief is claimed by or against the Minister of Justice in these proceedings, and a decision of the issue raised as to the validity of his direction cannot result in an order granting or refusing any relief. The fourth submission, too, is based upon what seems to us the unwarranted assumption that the Minister has such an interest as a party litigant would have in defending the validity of his direction. We do not agree that there is any requirement of the rules of natural justice that he should have an opportunity of being heard in support of the direction given by him.

In regard to the fifth submission it is enough to say that the defence contention, that there is no valid direction under Section 440A and this Court therefore has no jurisdiction to try the information without a jury, does not amount to an appeal from the direction that the Minister has purported to make under that section. The Court is not invited to affirm, vary or set aside the direction, but to try the information with a jury on the ground that it has no power to try it without a jury. In view of what has already been said the sixth submission calls for no comment.

[1] *(1945) 1 All England Reports 338 at 340.*

We are therefore of the view that we have jurisdiction to adjudicate upon the question whether the Minister's direction is a valid direction in the sense that it complied with the requirements of Section 440A of the Criminal Procedure Code. The relevant part of the section reads *as follows* :—

" (1) In the following cases, that is to say—

(*a*) . . . .

(*b*) in the case of any other offence which by reason of civil commotion, disturbance of public feeling, or any other similar cause, the Minister of Justice may direct that the person charged shall be tried before the Supreme Court at Bar by three Judges without a Jury. "

The decision of this matter raises a difficult point of interpretation. An illustration of this difficulty is perhaps provided by the fact that the members of this Court are themselves not unanimous in their view as to what the correct interpretation is. Learned Counsel for the defendant contends, in effect, that the sub-section should be read in the same sense as if it had been " in the case of any other offence, in the event of any civil commotion, disturbance of public feeling, or any other similar cause, the Minister of Justice may consider whether it is appropriately triable . . . . and may direct . . . . ". Upon this view of the matter the contention is that while the Minister's consideration of the appropriateness of the matter being tried by three judges without a jury is not justiciable in the absence of bad faith, which is not suggested in the present matter, the element of civil commotion, disturbance of public feeling or any other similar cause involves a question of fact which is objective and is determinable by the Court in the same way as any other question of fact comes to be determined. In other words, unless the Court is satisfied that there is, in fact, a civil commotion, disturbance of public feeling, and so on, there is an absence of the condition precedent to the exercise by the Minister of his power to consider the appropriateness of the method of trial contemplated by the sub-section. It is perhaps convenient at this point to advert to what in our view we are called upon to determine. It is not, in our opinion, for us to consider the desirability or otherwise of this particular provision of the law, which was introduced in 1915 in a year of stress, being retained upon the Statute Book. That is a question of policy with which this Court is not concerned. It is not, in our opinion, for this Court to consider the desirability or wisdom of the power retained in the Statute Book being invoked by the executive. It is not for us to consider whether in the public interest it is desirable that there should be such a limitation upon the Minister's power as is contended for by the defendant. In our view the task which devolves upon us is a narrower one—the arid task of determining the meaning of the words themselves.

In this connection it is perhaps permissible to point out, as the matter was adverted to in the course of his argument by learned counsel for the defendant, that when this Court at an earlier stage of these proceedings

was considering an application by the defendant that she should be supplied by the Attorney-General with a copy of the evidence that it was proposed to adduce, what it decided was that in its view it had no power to make such an order. The question as to whether or not it was fair that such information should be provided to the defence did not arise for the consideration of the Court and it was not therefore necessary to express a view upon it.

We have been referred in the course of the argument to many examples where the legislature has provided precisely the type of safeguard which is now contended for by the defendant, but it would seem that little assistance is to be derived from that fact for the reason that it is indubitably within the power of the legislature so to provide and it may well be—although that must always remain eminently a matter of opinion—that such a safeguard has much to be said in its favour. The question before us, however, is whether in this particular piece of legislation that particular safeguard has been provided.

It seems to the majority of the Court that to construe the words " in the case of any other offence which by reason of . . . . disturbance of public feeling . . . . the Minister of Justice may consider to be appropriately triable . . . . " as if they read " in the case of any other offence, in the event of there being a disturbance of public feeling . . . . the Minister of Justice may consider whether . . . . " would be to step into the shoes of the legislature and to introduce a limitation upon the Minister's exercise of his power to give a direction which, however desirable or undesirable in the abstract that may appear to be, is not provided by the language of the sub-section.

Not only would it seem not to be difficult, as a mere matter of drafting, for the legislature, had they wished to do so, to have imposed an objective condition precedent to the exercise of the Minister's power, but in fact they have done exactly that in sub-section (*a*) of the same section where they state " in the case of any offence under Section 120 of the Penal Code . . . . the Minister of Justice may direct . . . . ". Surely if the legislature had intended in sub-section (*b*) to impose a similar objective condition precedent it would be reasonable to expect that they would have used the same formula.

It is in the light of these considerations that the majority of the Court consider that one must seek another construction of the words in question. It seems to them that there is only a distinction in literary style between saying " in the case of any other offence which by reason of disturbance of public feeling . . . . the Minister of Justice may consider to be appropriately triable . . . . " and " in the case of any other offence which the Minister of Justice may consider by reason of disturbance of public feeling to be appropriately triable". The meaning in both cases, in their view, would be the same.

It is, no doubt, the position of the Crown, on this part of the case, that the words " by reason of disturbance of public feeling . . . . " are merely directive and constitute nothing more than guidance to the

Minister as to the matters on which he should satisfy himself before proceeding to consider whether any particular case is appropriately triable in the manner provided in this sub-section and impose no justiciable limitation upon his exercise of the power to give a direction. The case of *Liversidge v. Anderson*[1] was cited in support of that position. It is perhaps unnecessary to consider in detail the reasons given by the majority of the Law Lords in that case for the reason that, for our present purposes, the majority decision in that case is summarised in a later case in the Privy Council by Lord Radcliffe (*Nakkuda Ali v. M. F. de S. Jayaratne*[2]). Lord Radcliffe says at page 461 :

> "It would be impossible to consider the significance of such words as 'Where the Controller has reasonable grounds to believe . . . .' without taking into account the decision of the House of Lords in *Liversidge v. Anderson*. That decision related to a claim for damages for false imprisonment, the imprisonment having been brought about by an order made by the Home Secretary under the Defence (General) Regulations, 1939, Regulation 18B, of the United Kingdom. It was not a case that . . . . but it did directly involve a question as to the meaning of the words 'If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations . . . . ' which appeared at the opening of the Regulation in question. And the decision of the majority of the House did lay down that those words in that context meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing. On that basis, granted good faith, the maker of the order appears to be the only possible judge of the conditions of his own jurisdiction.
>
> "Their Lordships do not adopt a similar construction of the words in Regulation 62 which are now before them. Indeed it would be a very unfortunate thing if the decision of *Liversidge's case* came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words 'If A. B. has reasonable cause to believe' are capable of meaning 'If A. B. honestly thinks that he has reasonable cause to believe' and that in the context and surrounding circumstances of Defence Regulation 18B they did in fact mean just that. But the elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood ; and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning 'if there is in fact reasonable cause for A. B. so to believe'. After all, words such as these are commonly found when a legislature or law-making authority confers powers on a Minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been

[1] *(1942) A. C. 206.* [2] *(1950) 51 N. L. R. 457.*

satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith ; but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. "

We would add that had it been the intention of the legislature only to give a direction by way of guidance to the executive authority, whether it be the Governor of the Colony as it was when the Ordinance was originally enacted or the Minister of Justice as it stands upon the statute book today, this result could conveniently and suitably have been arrived at by instructions from the Secretary of State in the first case or an indication of Cabinet policy in the second. In that event there would be no need, nor would it seem to be appropriate, to place such a matter upon the statute book. Once it is so placed, it seems to us that in the words of Lord Radcliffe it " must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power ".

It is perhaps relevant to consider at this stage whether there are present in the matter now before us the elements which appear to have inclined the majority of the learned Law Lords in the *Liversidge case* to give their highly specialised interpretation. On a perusal of the speeches of Lord Maugham, Lord Macmillan, Lord Wright and Lord Romer, it appears that five matters came under their consideration on this head : first, that there was in existence what might be termed an " emergency " in the sense that the country was engaged in a desperate war, it being borne in mind that the relevant matters that were alleged against Mr. Liversidge took place in the year, 1940 ; secondly, that the information which would lead a Secretary of State to come to his conclusion in considering any case of detention under the Defence Regulation 18B must necessarily be of a highly confidential nature which it would be against the public interest to disclose even if the case were heard in camera ; third, the unsuitability for the consideration by a court of the particular question or questions involved in coming to a conclusion whether a detention in any particular case was justified.

These may perhaps be said to be the principal matters which affected the minds of their Lordships although in two of the speeches reference is made to the fact that the Home Minister is a high officer of state and must therefore be presumed to exercise his responsible functions with discretion and that in any event there is the further safeguard of his having to answer for his actions in Parliament.

As to the last two considerations they are, in our opinion, disposed of by Lord Radcliffe in the passage to which we have already referred where he says, " After all, words such as these are commonly found when a legislature or law-making authority confers powers on a Minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise . . . . ".

With regard to the other three matters we are of the opinion that there is no material before us and nothing has been said in the course of the arguments to lead us to suppose that the consideration of whether or not there is reasonable cause for considering that public feeling is disturbed would involve the examination of information of a highly confidential nature or is a topic which would be unsuitable for a Court to adjudicate upon. Moreover, an emergency, in the sense of the word as it existed in England in 1940, would happily not seem to be present in Ceylon today.

We are therefore of the opinion that before the Minister proceeds to the consideration of the question as to whether a matter is appropriately triable by three judges without a jury there must be reasonable grounds for his belief that there is a disturbance of public feeling (which would seem to be the relevant head in the present case). The majority of the Court holds that the sole test to be applied in this matter is whether, in the opinion of the Court, a reasonable man occupying the seat of the Minister could reasonably come to the conclusion that there existed a disturbance of public feeling. While this test, which the majority of us suggest is the apposite one, is less exacting than that contended for by the defence and which commends itself to one member of this Court, it is, in our view, none the less justiciable, for as stated by Lord Atkin in his dissenting speech in the *Liversidge case* at page 228 (a passage which would appear to be quite non-controversial) it has been " accepted in innumerable legal decisions for many generations, that ' reasonable cause ' for a belief when the subject of legal dispute has been always treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal ".

Although for reasons which will subsequently appear it may not be of practical importance in the present case, some argument was addressed to us on the question of who should begin when the question of disturbance or no disturbance comes to be tested. It seems to the majority of us that whichever test is applied, either that which the majority of the Court favour or that contended for by the defence, the position would be the same. The majority of us consider that the principle " *omnia praesumuntur rite esse acta* " is applicable to the Minister's order in this case. The order is on the face of it good in that it is signed by the appropriate person, invokes the appropriate section and refers to a power which, in a proper case, can appropriately be exercised. If then the question as to which party has to begin does arise—and by reason of what we think is the correct approach to the matter it does not arise—the presumption in question would have the effect that, in the absence of challenge, there existed either a factual disturbance of public feeling according to one test or reasonable grounds for a reasonable Minister to believe that there was a disturbance of public feeling according to the other and that he had considered whether the case was appropriately triable in the manner provided for in the section. In that view of the matter it would seem that it is for the defendant to begin.

From the practical point of view we consider that it is reasonable to limit our investigation to the question of " disturbance of public feeling or any other similar cause " for the reason that there is no material

before us, and indeed it has not been contended, that there was in existence either a civil commotion or reasonable ground for supposing that there was a civil commotion. What, then, is the meaning of the phrase "disturbance of public feeling" ? There are no doubt disturbances of public feeling which are manifested—by, for instance, public meetings, organized demonstrations of protest, processions, and so on—but it seems to us that the phrase is not limited to cases where there is an open manifestation of a disturbance of public feeling. In our view one of the tests which could be applied to determine whether or not a disturbance of public feeling exists would be to consider the reactions to the matter in question of the ordinary citizen in various walks of life. To take a homely example, if the normal private citizen on his lawful occasions travelling by bullock cart, bus, train or motor car, as the case may be, were to say to himself or think to himself "What is the country coming to ?", that should surely be regarded as indicating the existence of a disturbance of public feeling. To say, for example, of the Prime Minister of a country engaged in war that he is in the pay of the enemy would obviously give rise in the mind and heart of the ordinary citizen to the kind of anxiety to which we have just referred. In the present matter a fundamental question for our consideration is whether an allegation, true or false, in a newspaper of any considerable circulation that the person who has been selected by the Sovereign to fill the position of Governor-General of Ceylon is engaged in swindles on an international scale and that a public trial of the gang of which he is a member is imperative has caused (on one view) or could reasonably be considered to have caused (on the other) a disturbance of public feeling.

It seems to all of us that applying the test which commends itself to the majority of the Court, that the question as to whether there was reasonable ground for the belief that there existed a disturbance of public feeling can only be answered one way. We find ourselves quite unable to adopt any other view than that to say these hard things, whether they be true or false, of the first Ceylonese to be appointed Governor-General of the Island, affords reasonable ground for a Minister of State or indeed any other reasonable person to believe that public feeling had been disturbed in the sense to which we have already adverted.

Incidentally, learned counsel for the defendant submitted that the words "disturbance of public feeling" should be limited to cases in which such disturbance is of a nature that would make a trial by jury unsuitable. In our opinion there is no substance in that contention for the reason that the very matter which the Minister has to consider is whether the case in question can appropriately be tried without a jury. If the words are subject to the limitation suggested by learned counsel for the defendant, then there would be nothing left for the Minister to consider and the words "Which . . . . the Minister of Justice may consider to be appropriately triable . . . ." would be meaningless.

Before examining what flows from our principal conclusion, we must consider two other points that were raised by learned counsel for the defendant. First, he contended that in a case such as the present where

the Minister in his direction does not refer to the matters which influenced him nor to the precise head under which he regarded the matter as falling, it is impossible for this Court to determine the question whether the Minister was reasonably entitled to believe, when we do not know what it is that he did believe. While we are not disputing that there might be cases under other statutes in this or other countries where such a difficulty might arise in view of the number and complexity of the various heads which a Minister might take into consideration, we feel that in the present case no such difficulty arises for the reason that it is clear, or seems to us to be clear, from the very nature of the libel alleged in the information, that the appropriate head to be considered is that relating to disturbance of public feeling. Secondly, it was contended that the direction was bad in that it was unlimited as to time. Assistance for this proposition was sought in the circumstance that in the *Liversidge case* in considering the applicability of regulation 18 (B) one of the elements that the learned Law Lords took into consideration was the fact that a terrible war was in full progress. It is no doubt true that once the emergency, that is to say the war in question, had ended the need and, indeed, even the propriety of detaining persons under that regulation would have passed away. Even if it would be proper for us to take such matters into account, we are of the opinion that no considerations of that nature arise in regard to the present matter. The libel was published on the 1st of July, 1954; the information was filed on the 5th of August and the direction was issued on the 6th. The present proceedings began on the 26th October, a date which was some weeks later than might have been achieved were it not for the fact that a reasonable adjournment was granted to the defence to enable the leading counsel, who is a member of the English Bar, to comply with the necessary requirements to enable him to be called to the Bar of Ceylon. We do not consider that there is any substance in the objection. Moreover any disturbance of public feeling that may have been aroused by this libel in July would, in our view, reasonably have been expected to continue up to the present day and until such time as the questions raised by the libel are resolved.

On the view, therefore, of the words in the section which has been adopted by the majority of the Court, we all consider, as we have already stated, that the test has been satisfied. That is therefore sufficient to determine the present matter, and we hold that the information is in order, that the Minister's direction is valid, and the trial must proceed.

It only remains for us to refer to the matter of certain affidavits which were tendered by Counsel on either side to us at the conclusion of the arguments. It is, of course, apparent that had we adopted the construction contended for by the defendant and which has commended itself to one member of this Court, the reception of evidence would, no doubt, have been relevant in determining whether or not the factual test as to the existence of a disturbance of public feeling at the material

time had been satisfied. In view, however, of the opinion which the majority of the Court have formed and upon which our order is based, the affidavits cease to be germane and do not require our consideration. *

(Sgd.) ALAN ROSE,
Chief Justice.

(Sgd.) E. H. T. GUNASEKARA,
Puisne Justice.

(Sgd.) M. F. S. PULLE,
Puisne Justice.

Preliminary objections overruled.

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* On December 3, 1954, the Court made order acquitting the defendant on the ground that the material adduced by the Crown to establish that the defendant published the issue of the newspaper in question with the necessary knowledge of its contents was insufficient to justify the Court in calling upon the defendant for her defence.—Ed.