(1982) 33 WIR 183

Ramson v Barker and Another

COURT OF APPEAL OF GUYANA
JHAPPAN CJ, GEORGE JA and BISHOP J
10TH MAY, 17TH, 19TH, 25TH, 26TH NOVEMBER, 1ST, 14TH DECEMBER 1980; 15TH JANUARY, 5TH FEBRUARY 1981; 17TH MAY 1982

Fundamental rights and freedoms – Parties to proceedings – Respondent – Liability for acts of others – Actions neither sanctioned nor approved

Fundamental rights and freedoms – Redress – Violation by group of police – Police acting under central direction – Action in exercise of executive power of State

Fundamental rights and freedoms – Freedom of movement – Extent of freedom – Not including right to pass and repass along highway – Constitution of Guyana, article 14(1)

Fundamental rights and freedoms – Freedom of expression – Extent of freedom – Not including fleeting discussion between persons meeting by chance – Opportunity to continue interrupted discussion elsewhere – Constitution of Guyana, article 12(1)

Fundamental rights and freedoms – Freedom of assembly and association – Extent of freedom – Opportunity to continue interrupted meeting elsewhere – Constitution of Guyana, article 13(1)

Fundamental rights and freedoms – Pleading – Need to plead each allegation of infringement – Failure to plead – No effect on respondent's case

Fundamental rights and freedoms – Redress – Availability of alternative remedy – Alternative remedy not providing reparation or compensation to victim – Constitution of Guyana, article 19(2)

The appellant, an acquaintance, C, and a third party were standing some distance from a point where earlier the police, acting on instructions from headquarters, had dispersed an unlawful assembly. The appellant and his acquaintances were discussing the police action in dispersing the crowd when a policeman in uniform (but without a number) asked what the appellant was doing. The appellant replied that it was no concern of the policeman, and the latter seized the appellant by the arm. The appellant accused the policeman of assault and demanded his name. Another policeman came up and jabbed the appellant with a stick. By then there were about a dozen policeman at the scene, including a deputy superintendent and an inspector. The police told the appellant to go away. The appellant then got into his car and drove away. Shortly afterwards, he wrote to the Commissioner of Police, the first respondent,

and asked for the names of the policemen involved in the incident. The first respondent did not supply the names; but he invited the appellant to make a report so that a police investigation could be held. The appellant did not take advantage of the invitation but filed an originating motion citing the first respondent as well as the Attorney-General, complaining of the breach of his rights to freedom of expression (article 12(1) of the Constitution of Guyana), freedom of assembly and association (article 13(1) of the Constitution), and freedom of movement within Guyana (article 14(1) of the Constitution). The appellant filed an affidavit in support of his motion, and the first respondent filed an affidavit in reply; the latter, however, relied heavily on information provided by the deputy superintendent, and in places was self-contradictory and amounted to hearsay. At the commencement of the hearing counsel for the appellant drew attention to inconsistencies between the appellant's affidavit and that of the first respondent and was allowed to call C to give oral evidence. The appellant was also called to give evidence and counsel for the respondents in turn called the inspector to give evidence at the hearing. The trial judge found that the events complained of had occurred in an atmosphere charged with and prone to violence and at a time when a breach of the peace was likely to occur (although such had been suggested in the affidavit of the first respondent, there was no corroboration of this statement) and dismissed the appellant's motion. The appellant appealed to the Court of Appeal where he further complained of a deprivation of his right to personal liberty (article 5 of the Constitution).

Held that the appeal would be allowed, because–

(1) (*per* Jhappan CJ and George JA) (a) in the absence of evidence that the first respondent (the Commissioner of Police) had sanctioned or approved the acts of his subordinates he could not properly be a party to the motion so far as redress was sought for breach of any fundamental right guaranteed by the Constitution;

Raleigh v Goshen [1898] 1 Ch 73 and *Bainbridge v Postmaster-General* [1906] 1 KB 178 applied.

(b) the case was concerned not with the act of an individual but with the concerted action of a group of policemen, centrally directed and under the command of senior members of the police force in whose presence the acts complained of were perpetrated; accordingly, such action had been taken in the purported exercise of the executive power of the State;

Dictum of Lord Diplock in *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)* (1978) 30 WIR 310 at page 318 applied.

(c) in the absence of any nuisance or any evidence of apprehension of a breach of the peace, the requests by the police to the appellant to move and their action to give effect to the requests were unlawful;

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(d) the acts of the police did not, however, deprive the appellant of his right to freedom of movement under article 14(1) of the Constitution since that right did not encompass the right to pass and repass along the highway;

(e) nor did the police infringe the appellant's right to freedom of expression (article 12(1) of the Constitution) or his right to freedom of assembly and association (article 13(1)) since he could have continued his discussions elsewhere and the guarantee of freedom of expression did not protect a fleeting discussion between persons who had happened to meet by chance; further, the police action could not properly be described as having been directed at restricting the appellant's rights under article 12(1) or article 13(1);

(f) although the appellant ought to have pleaded specifically his complaint that the seizure of his arm constituted an infringement of personal liberty (article 5 of the Constitution), he was not precluded from raising the matter for the first time on appeal since it had not been suggested either that (had the matter been pleaded initially) new evidence would have been adduced or that the case would have been presented differently by the respondents; accordingly, as the seizure of the appellant's arm violated his freedom from unjustifiable acts of trespass and had been committed by the executive power of the State, there had been a breach of article 5 in respect of which the appellant should receive compensation by way of redress;

Dictum of Lord Diplock in *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)* (1978) 30 WIR 310 at page 320 applied.

(g) (Bishop J concurring on this point) the remedy for the infringement of personal liberty could not be precluded by the plea that the appellant had an adequate alternative remedy available (article 19(2) of the Constitution) in the liability of the police to disciplinary proceedings, since the concept of "redress" in article 19 involved compensation to or reparation of the person wronged rather than punishment of the wrongdoer.

(2) In the alternative (*per* Bishop J), the trial judge had wrongly taken into account extraneous matters and matters on which no evidence had been led and, accordingly, the appellant might not have received a fair hearing of his application.

Ramson v Barker (1979) 28 WIR 191 reversed.

Cases referred to in the judgments

Ameerally and Bentham v Attorney-General, Director of Public Prosecutions and Prem Persaud (1978) 25 WIR 272, Guyana CA

Attorney-General of New South Wales v Perpetual Trustee Co Ltd [1955] AC 457, [1955] 1 All ER 846, [1955] 2 WLR 707, PC

Bainbridge v Postmaster-General [1906] 1 KB 178, 75 LJKB 366, 95 LT 120, England CA

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Barney v City of New York, 193 US 430 (1902)

Beevis v Dawson [1957] 1 QB 195, [1956] 3 All ER 837, [1956] 3 WLR 1016, England CA

Berkeley Peerage Case (1811) 4 Camp 401, [1803-13] All ER Rep 201, HL

Bozson v Altrincham Urban District Council [1903] 1 KB 547, 72 LJKB 271, 67 JP 397, England CA

Burden v Rigler [1911] 1 KB 337, 80 LJKB 100, 103 LT 758
Chamroo v Rookmin and Satnarine (1968) 13 WIR 470, Trinidad and Tobago CA
Christian Catholic Church v Jeffrey (1959) 1 WIR 386, [1959] LRBG 179, Federal Supreme Court
Christie v Leachinsky [1947] AC 573, [1947] 1 All ER 567, HL
Cohen (a bankrupt), Re [1950] 2 All ER 36, [1950] WN 266, 66 TLR (Pt 1) 1207, England CA
Commercial Plastics Ltd v Vincent [1965] 1 QB 623, [1964] 3 All ER 546, [1964] 3 WLR 820, England CA
Commonwealth of Australia v Bank of New South Wales [1950] AC 235, [1949] 2 All ER 755, PC
Connecticut Fire Insurance Co v Kavanagh [1892] AC 473, 61 LJPC 50, 67 LT 508, PC.
Coomber v Berks JJ (1883) 9 App Cas 61, 53 LJQB 239, 50 LT 405, HL
D'Aguiar v Barrow (1963) 5 WIR 12, [1963] LRBG 43, British Guiana Full Court.
De Freitas v Benny (1975) 27 WIR 318, [1976] AC 239, [1975] 3 WLR 388, PC
Director of Public Prosecutions v Nasralla (1967) 10 WIR 299, [1967] 2 AC 238, [1967] 2 All ER 161, [1967] 2 WLR 13, PC
Dumas v Confederation Life Association (1966) 11 WIR 73, Trinidad and Tobago CA
Dumbell v Roberts [1944] 1 All ER 326, 13 LJKB 185, 170 LT 227, England CA
Enever v R (1906) 3 CLR 969, 12 ALR 592, Australia High Court
Fisher v Oldham Corporation [1930] 2 KB 364, [1930] All ER Rep 96, McCardie J
Fitts v McGhee, 19 Sup Ct Rep 869
Gilbert v Endean (1878) 9 Ch D 259, 39 LT 404, 27 WR 252, England CA
Hadwell v Righton [1907] 2 KB 345, 76 LJKB 891, 97 LT 133, Phillimore J
Hope and Attorney-General v New Guyana Co Ltd and Teekah (1979) 26 WIR 233, Guyana CA
Hubbard v Pitt [1975] 1 All ER 1056, [1975] 2 WLR 254, Forbes J; affirmed on different grounds [1976] QB 142, [1975] 3 All ER 1, [1975] 2 WLR 201, England CA
J (an infant), Re [1960] 1 All ER 603, [1960] 1 WLR 253
Jacker v International Cable Co (1888) 5 TLR 13, England CA
Kemrajh Harrikissoon v Attorney-General (1979) 31 WIR 348, [1980] AC 265, [1979] 3 WLR 62, PC

Kharam Singh v UP [1964] 1 SCR 332, India Supreme Court
Lewis, Ex parte (1888) 21 QBD 191, 57 LJMC 108, 50 LT 338
Lovell v Wallis (1883) 53 LJ Ch 494, 49 LT 593, Kay J
Lumley v Osborne [1901] 1 KB 532, 70 LJKB 416, 84 LT 461
M'Hardy v Hitchcock (1848) 11 Beav 93, 17 LJ Ch 256, 11 LTOS 170
Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133, [1973] 2 All ER 943, [1973] 3 WLR 164, HL
O'Kelly v Harvey (1883) 14 LR Ir 105, 15 Cox CC 435
Pennoyer v McConnaughy, 11 Sup Ct Rep 699
Perkowski v Wellington Corporation [1959] AC 53, [1958] 3 All ER 368, [1958] 3 WLR 564, PC
Piddington v Bates [1960] 3 All ER 660, [1961] 1 WLR 162
R v Banks [1972] 1 All ER 1041, [1972] 1 WLR 346, England CA
R v Clark (No 2) [1964] 2 QB 315, [1963] 3 All ER 884, [1963] 3 WLR 1067, England CCA
R v Commissioner of Police of the Metropolis, ex parte Blackburn [1968] 2 QB 118, [1968] 1 All ER 763, [1968] 2 WLR 893, England CA
R v Jones (1848) 6 State Tr NS 783
R v Willis [1960] 1 All ER 331, [1960] 1 WLR 55, England CCA
Raleigh v Goshen [1898] 1 Ch 73, 67 LJ Ch 59, 77 LT 429, Romer J
Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 1) (1976) 29 WIR 318, [1977] 1 All ER 411, PC
Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2) (1978) 30 WIR 310, [1979] AC 385, [1978] 2 All ER 670, [1978] 2 WLR 902, PC
Rossage v Rossage [1960] 1 All ER 600, [1960] 1 WLR 249, England CCA
Salter Rex & Co v Ghosh [1971] 2 QB 597, [1971] 2 All ER 865, [1971] 3 WLR 31, England CA
SOS (Mowbray) Pty Ltd v Mead (1971) 124 CLR 529, Australia High Court
Standard Discount Co v La Grange (1877) 3 CPD 67, 47 LJQB 3, 37 LT 372, England CA
Subramaniam v Public Prosecutor [1956] 1 WLR 965, PC
Thornhill v Attorney-General (1979) 31 WIR 498, [1980] 2 WLR 510, PC
Tindal v Wesley, 17 Sup Ct Rep 770
Williams and Salisbury, Re (1978) 26 WIR 133, Guyana CA
Wright v Sharp (1947) 176 LT 308, Cassels J
Young (JL) Manufacturing Co Ltd, Re [1900] 2 Ch 753, 69 LJ Ch 868, 83 LT 418, England CA

Appeal

Charles Rishiram Ramson appealed to the Court of Appeal of Guyana (civil appeal 16 of 1980) against the dismissal by Crane CJ (*Ramson v Barker* (1979) 28 WIR 191) of his application for declarations that his fundamental rights and freedoms under the Constitution had been infringed. The respondents to the appeal were Lloyd Barker (the Commissioner of Police) and the Attorney-General. Bishop J sat as an additional

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judge of the Court of Appeal. The facts are set out in the judgment of George JA.

BO Adams SC and *A Chase* for the appellant
JC Nurse and Ramgopaul for the respondents

Cur adv vult.

Jhappan CJ. I have had the pleasure of reading the decision of George JA. I agree with both his reasons and conclusions and I concur with the order he proposes. I have nothing to add.

George JA. On 2nd November 1979, the appellant filed an originating notice of motion in the High Court against the respondents, the first of whom being at all material times the Commissioner of Police. He claimed that several of his fundamental rights guaranteed and protected by the Constitution had been violated. His motion was dimissed and he now appeals to this court against the order of dismissal.

What transpired immediately prior to the breaches complained of were narrated by Crane CJ (*Ramson v Barker* (1979) 28 WIR 191) in the following words (at page 195):

> 'On the evening of 22nd August 1979 about 4.00 to 4.30 pm a large crowd of people had assembled at the corner of Campbell Avenue and Delph Street, Campbellville. Their purpose was to listen to the speakers of a newly-formed political party, the 'Working Peoples' Alliance' who were preparing to address them. The meeting, so say the police authorities, was not sanctioned by them. It was necessary for the convenors to give them notice in writing as required by the Public Order Act, section 3(1), and, as there was no such notice, the meeting became an unlawful assembly and it was necessary to disburse the gathering. The crowd, however, did not leave the scene altogether; several pockets of persons persisted in remaining together in nearby yards some two hours after the police had broken up the assembly.'

The appellant together with a Mr Chang, both of whom are attorneys-at-law, arrived in Sheriff Street about 6.10 pm. They had both intended to attend the meeting. At about 7.30 to 8.00 pm the appellant, Mr Chang and another were standing on the western side of his motor car which was parked in Sheriff Street facing north some 500 yards north of Campbell Avenue (which runs east and west and is at right angles with Sheriff Street). The right wheels of the car were on the eastern parapet of the street whilst the left wheels were on the road surface about I foot west of its eastern edge. They were discussing the action of police in dispersing the crowd. While there, a policeman in uniform which was devoid of any regulation numbers came up.

As to the actual acts complained of on which the appellant founded his claim, the trial judge accepted that the assault was committed in the manner described by him. The appellant had said that the policeman

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who came up, pulled his left arm, spun him around and demanded to know who was the owner of the car. After this information had been supplied, the policeman then proceeded to ask the appellant the reason for his presence on the road; whereupon the appellant replied that that was his business. This caused the policeman to apply greater pressure to the appellant's arm resulting in his fingernails penetrating the muscles of the arm. The appellant pointed out to the policeman that he was assaulting him and demanded to know his name and number. The policeman applied greater force and shaped up to hit him with a staff which he had. At the same time another policeman jabbed him with a night-stick, in his ribs. By then about a dozen other policemen had come up, three of whom were officers whom the appellant recognised. None of them wore the usual regulation number. The appellant called one of the officers, a deputy superintendent of police and the most senior rank present, by his surname and drew his attention to what had happened. From his response it would appear that the officer took umbrage at being addressed by his surname. He was told by a policeman that the two men were lawyers and the officer remarked rather derisively "so what, we just lock up another one". In the meanwhile the policeman who had been jabbing the appellant continued to do so and ordered him to enter his car. He complied reluctantly and drove away.

On 10th September 1979, the appellant's legal adviser wrote to the first respondent. The letter incapsulated the incident at Sheriff Street and requested the following information: (a) the names and numbers of the persons detailed to carry out police duty; (b) whether any members of the party had less or more than three months' service as a policeman and the names of those persons; and (c) the name and rank of the officer in command of the persons so detailed.

The first respondent's reply was dated 18th October 1979. In effect he rejected the requests stating that he had

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'formed the opinion that a Commissioner of Police should not be liable to be privately [sic] interrogated... in respect of the deployment of police personnel.'

He invited the appellant, however, to make a detailed report, if he had not already done so, in order that a full police investigation might be set in train. The appellant did not comply with this suggestion.

As regards the proferred investigation, it had been contended before the trial judge by counsel for the respondents that under section 4(1) of the Police (Discipline) Act, both the use of unnecessary violence by a member of the force to any person with whom he might be brought into contact in the execution of his duty, and the concealment or disguise of his number have been deemed offences against discipline; and under section 5(1) it is obligatory on the police to investigate every alleged commission of any offence against discipline under the Act. He argued that any punishment which might have been meted out against the guilty policeman would have been an adequate alternative remedy available to

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the appellant within the contemplation of article 19 of the Constitution. Accordingly, he urged the court to eschew the grant of such constitutional reliefs as otherwise may have been available to the appellant. However, the trial judge declined counsel's invitation to pronounce on this submission and chose to ground his decision on the interpretation which had recently been given by this court to the meaning of the word "hindered" in article 12(1) of the Constitution in the case of *Hope and Attorney-General v New Guyana Co Ltd and Teekah* (1979) 26 WIR 233.

In his motion, as at the trial, the appellant had complained that three of the fundamental rights and freedoms guaranteed under Chapter II of the Constitution have been violated. These were his freedom of expression (article 12); freedom of assembly (article 13); and freedom of movement (article 14). More specifically he claimed that at the time of the attack on his person, he and his colleague were lawfully on a public way engaged in what was a permissible discussion, namely the attitude of the police in their dispersal of the crowd which had gathered to hear the speakers at the proposed meeting. In pronouncing for the reasonableness of the action of the police in dispersing the crowd, Crane CJ had this to say (28 WIR at pages 202, 203):

'As it seems to me, there exists for examination in order to determine whether there was reasonably apprehended a breach of the peace, these important facts which I have already stated; there were crowds of people, albeit small pockets of them, still in the neighbourhood of the intended meeting place; they were congregating in nearby yards and other places in the vicinity thereof. The police were evidently taking no chances; they apprehended a breach of the peace was likely to occur and they wanted the area cleared of people and parked vehicles. This is clear enough, because, before they accosted [the appellant] they did not know who he was; they did not know he was a lawyer or the fact that he was speaking to his colleague about police action and methods used by them to disperse a crowd of some 3000 to 4000 people. In my view, had the police known the subject of their discourse, that alone would have been sufficient justification for ordering them to move on; that would have certainly been ample justification for fearing that a crowd might gather around them in an atmosphere that was already charged with and prone to violence and ample ground for holding that a breach of the peace was likely to occur. It seems to me ironical that on [the appellant's] own admission, he and his colleague were together speaking of, if not criticising, the methods of crowd-dispersal and control by the police, and he has now chosen to make that fact the basis for launching this constitutional motion.'

As I understand the rationale of the trial judge, the original act of dispersal was justified as the police had had no notification of the meeting in accordance with section 3(1) of the Public Order Act. Accordingly, they were acting under section 3(4) when they caused the meeting to be

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dispersed. And, although the crowd dispersed from the meeting-place, pockets of people gathered in nearby yards and a large number assembled some distance away on Sheriff Street in the vicinity of, and on the bridge leading to, the Campbellville government school.

This must have conveyed to the police the impression that the crowd intended to defy their direction to disperse and, accordingly, led them to fear that there would be a breach of the peace. This would explain their actions in dispersing the crowd which had gathered in the vicinity of the school and which led the other policemen to require the appellant (who was some distance away from the school) to remove himself and his car. And, in such a case, it would be a good defence to an action for assault that the police had "laid their hands" on the appellant without more force than was necessary in the course of dispersing the crowd (see *O'Kelly v Harvey* (1883) 14 LR Ir 105).

Accordingly, the trial judge concluded that, if the act of requiring the appellant to move was lawful and within the powers of the police, he could not be said to have been hindered in the exercise of his freedom of movement. And the fact that at the time he was (coincidentally) not alone, but with two others with whom he was carrying on a discussion, could not, on the principles enunciated in the *Hope's* case (1979) 26 WIR 233, amount to any constitutional violation as the direct intention of the police action was not to hinder the appellant in the exercise of any such right. In other words, the action of the police must be considered as being merely incidental to the direct intention of getting him to move on in order to avoid a threatened breach of the peace.

As regards the trial judge's finding with regard to the absence of a notification of the meeting, I have perused the notes of evidence as well as the affidavits filed in the motion and find myself in agreement with the observation of counsel for the appellant that there is a complete absence of evidence as to a notification under the Public Order Act. In the only affidavit filed in answer to the motion, the first respondent did not raise this as an issue. He deposed that he had been informed that members of the police force, acting in the course of their duty along Sheriff Street, Campbellville, requested certain members of the public, including the appellant, not to leave their cars on Sheriff Street, which was the scene of an unauthorised procession threatening a breach of the peace. In passing it should be observed that this averment, like so much of the first respondent's affidavit, was hearsay and therefore of very little (if any) evidential value. This much is clear, however; there was no procession and the question of notification for the meeting was never a live issue at the trial.

In this regard it should be noted that under section 3(1) of the Public Order Act, unless a shorter notice is accepted under the proviso, a person who desires to hold a meeting in a public place is required to notify the appropriate officer of police of the time and place of the meeting not less than forty-eight hours and not more than one month prior to the time at which he desires to hold the meeting. Under section 3(2), the Commissioner

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of Police is empowered to restrict or prohibit more than one meeting in the same locality on the same day; and section 3(4) gives power to any member of the police force to stop or cause to be dispersed any meeting in a public place in respect of which no notice has been given under section 3(1), or which has been prohibited, or which is held contrary to any restrictions imposed under section 3(2). Under section 13 it is a summary conviction offence to hold a meeting without notice or one which is prohibited or held in violation of any imposed restriction.

The scheme of the Public Order Act appears to have modified the common law position which was explained by Professor Holdsworth in his *History of English Law*, Vol 10, page 701, in the following words:

> '...the law does not guarantee a right of public meeting; but it does not forbid it unless the exercise of the right can, in the circumstances, be shown to infringe some provision of the criminal law, of the law of tort, of a statute, or of a regulation having the force of a statute.'

And in *Ex parte Lewis* (1888) 21 QBD 191 at page 197 Wills J said that–

> 'a claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it.'

But by contrast it should be noted in *Burden v Rigler* [1911] 1 KB 337 it was held that the mere fact that a meeting was held on a public highway did not make it unlawful.

The Public Order Act by necessary implication seems to make any meeting on the public highway prima facie lawful, so long as notification of the time and place of the meeting had been given in accordance with the Act. It seems to have been intended to give statutory approval to the view expressed by Professor E C S Wade in an article in the *Modern Law Review* in 1938. He said (at page 184):

> 'Thus the right is reduced to this: any person may hold a public meeting if he has obtained beforehand the assurance of the local chief of police that he will not take proceedings against him on the ground of obstruction.'

However, not even in their addresses before Crane CJ did counsel for the parties make reference to the question of lack of notice. And, in this regard, it should be noted that there was no evidence that the appellant was in any way concerned with organising the meeting which was scheduled to be held at the corner of Delph Street and Campbell Avenue; and therefore he could not be said to be "a person who desired to hold a meeting in a public place" for the purpose of section 3(1). If, therefore, the justification for the request by the police that they should disperse was based on the failure or omission on the part of the organisers of the

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meeting to give the required notification, one would have expected this to have been specifically deposed to. Then the evidential burden may well have shifted to the appellant to prove, probably through the organisers, that proper and adequate notification had been given. With respect, however, in the absence of any such averment or evidence as to lack of notification, I do not think that there was any burden cast upon the appellant. As I have already pointed out, the reason or justification given in the first respondent's affidavit for the police action, albeit in the nature of hearsay, was that there was an unlawful procession which threatened a breach of the peace. Aside from the fact that the court could not have acted on this material, the *viva voce* evidence given by Ins Cort was in any event to the contrary. Far from testifying about a procession, he spoke only of a proposed meeting at the corner of Delph Street and Campbell Avenue. In addition, he admitted that there was no loudspeaker equipment in evidence. If such had been the case then, under section 12, it would have been an offence if anyone held, organised, formed, spoke at, or took part in the meeting without the permission of the proper police authority. He went on, however, to make the

surprising (and in many respects quite alarming, yet very pertinent) statement that "our instructions from Brickdam headquarters [of the Police Force] were that no meeting whether with or without loudspeaker was to go on"; in other words, that the policemen had gone to the scene of the meeting with the specific intention that it should be prevented. And he further said that no meeting was held because the organisers had not obtained permission from the police, a requirement which he later admitted to knowing was unnecessary in the circumstances. (In this regard see *D'Aguiar v Barrow* [1963] LRBG 43 at page 53.) Aside from the above, the inspector led no other express evidence that the police apprehended a breach of the peace so as to warrant a dispersal of the crowd, which had assembled at the corner of Delph Street and Campbell Avenue. The relevant portion of his evidence bearing on the question of the dispersal was as follows:

> 'The crowd that gathered had to be dispersed by the police (about 300 to 400 persons were gathered around 4.00 to 4.30 pm) ... About 7.30-8.00 pm we went to the Campbellville Government School because another crowd was gathering there. I with Bentick, Rambarran, Cpl McPherson, Cons Trotman and several others, dispersed crowds of persons about the road and bridge.'

The only other evidence of the dispersal of the crowd came from the witness Chang. His evidence was as follows:

> 'The meeting was due to commence at 6.30 pm on 22nd August 1979, but by 7.30 the police had dispersed the gathering. The incident with [the appellant] occurred about half an hour after the crowd had dispersed. There were many people gathered in nearby yards after the police dispersed the crowd.'

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In my opinion, therefore, there was no evidence on record to support the trial judge's finding as to the lack of notice which would have entitled the police to disperse the crowd. And the fact that some of them gathered in small pockets in yards nearby after the initial dispersal could not, without more, be justification for saying that the police feared that they would be likely to perpetrate breaches of the peace. There was, in my opinion, need for further evidence, such as attitudes or behaviour of those who had gathered in the yards from which the court would have been able to determine whether the action of the police could be said to have been reasonable. Were they, for example, hostile; or were they in fact only curious on-lookers? In the absence of such evidence their presence in the yards may have amounted to a trespass against the owners, but no more.

But as regards those who had gathered together in the vicinity of the school, it may well (and with much reason) be asserted that by so doing they had formed themselves into a meeting at a location and at a time for which no notice had been given; and, accordingly, that the police were entitled to disperse them. But the immediate question which requires consideration is whether the police can in effect take advantage of their unauthorised act in initially dispersing those who had gathered at the original meeting place. I think this must be answered affirmatively. In *R v Jones* (1848) 6 State Tr NS 783 at page 811 Wilde CJ expressed the opinion that–

> 'if the police had interfered with [a lawful meeting] those present were not at liberty to resist in such circumstances; they ought to have dispersed by law, and have sought their remedy against any unjust interference afterwards.'

By a parity of reasoning, I think that the crowd would not have been justified in reconvening on another public road after having been told to disperse.

But what of the appellant? He was not part of the original crowd which had been dispersed, for it would appear that he arrived after the first dispersal of the crowd at the corners of Delph Street and Campbell Avenue. He was discussing the attitude of the police with his two friends some distance away from the school where they were again engaged in dispersing a crowd. In these circumstances could it be reasonably said that the police were justified in requiring him to move on? Was there any evidence to suggest that they feared a breach of the peace because of his presence and that of his two companions on the road? I think not. And, even if there was sufficient evidence from which it could be said that the police had feared a breach of the peace from the crowd which had assembled on Sheriff Street outside the school, there was no evidence to show that the appellant and his friends were in any way connected with that group. And I must say with every respect that I do not think that the fact that they may well have been adversely criticising the attitude of the police, whether or not known to them, was any justification for the requests that they should remove themselves.

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But counsel for the respondents argues that the presence of the appellant and his friends on the road was an unlawful act; and for the purposes of this contention both counsel acted on the assumption that Sheriff Street is a highway. It is the submission of counsel that the appellant and his friends were abusing their use of the highway at the time of the police intervention. In 10 *Halsbury's Laws of England* (3rd Edn) page 73, paragraph 107, it is stated that:

'The right of the public is a right to pass along a highway for the purpose of legitimate travel, not to be on it except so far as their presence is attributable to a reasonable and proper use of the highway as such.'

As regards the reasonable and proper use of the highway other than the right to pass along, Phillimore J in *Hadwell v Righton* [1907] 2 KB 345 at page 348 said, "members of the public in addition to using it *eundo et redeundo*, are also entitled to use it *morando* for a short time". Examples of such user were given in *Hubbard v Pitt* [1975] 2 WLR 254 at page 259 as including the rest by a tired pedestrian, or the repair of a minor break-down of a motor vehicle. Any use of the highway which goes beyond these public rights is a trespass, unless such user is specifically permitted by dedication or by statute. But, as was pointed out by Forbes J at page 260, such a trespass is only actionable at the suit of the owner of the soil of the highway.

Additionally, however, the misuse of the highway may be so unreasonable and excessive as to amount to a public nuisance which is in common law a misdemeanour (see *R v Clark (No 2)* [1964] 2 QB 315). But in my opinion the presence of the appellant, his companions and his motor vehicle in the way described in the evidence could not be said to have been so unreasonable and excessive a user as to amount to the criminal offence of a public nuisance. The result is that I agree with the submission of counsel for the appellant that the police were not justified in their action in compelling the appellant to remove from his position on Sheriff Street.

It is his further contention that the action of the police was in the purported exercise of their powers under the Police Act and, accordingly, was an exercise of the State's executive power. He, therefore, submits that the appellant is entitled to seek redress against the State for any such abuse of power if it amounts to a breach of any of the fundamental rights and freedoms guaranteed by the Constitution. And, by virtue of section 30 of the High Court Act, the appropriate authority against whom such proceedings may be brought is the Attorney-General. But, even if this submission is valid, does it justify the joinder of the first respondent? Under section 7(1) of the Police Act the first respondent in his capacity as Commissioner of Police is entrusted with the command and superintendence of the police force and is responsible to the appropriate Minister for, inter alia, peace and good order throughout the country and for the efficient administration and government

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of the force. This does not, however, make him liable for the tortious or other unlawful acts of those under his command, unless these have been personally sanctioned or directed by him. And the evidence of Ins Cort did not point to any personal involvement on the part of the first respondent. For, although he said that the instructions to prevent the meeting emanated from the Brickdam headquarters, this by itself falls far short of adequate proof that the first respondent approved or directed the operation. Indeed, it is a long and well-established principle that a superior State official is not liable for the acts of those who are subordinate to him (see *Raleigh v Goshen* [1898] 1 Ch 73 and *Bainbridge v Postmaster-General* [1906] 1 KB 178). Furthermore section 15 of the Police Act clothes every member of the force, whatever his rank, with an equal amplitude of rights, duties, powers, authorities, privileges and amenities; and also makes each of them equally liable for the penalties and subject to all the responsibilities which, by common law or any statute, devolve on any member of the force. Accordingly, both at common law and under the Police Act the powers of a policeman are exercisable by virtue of his office and cannot be exercised on the responsibility of any other person than himself. His status was admirably explained by Griffith CJ in the Australian case, *Enever v R* (1906) 3 CLR 969 at page 977 in which he said:

'If he arrests on suspicion of a felony the suspicion must be reasonable to him. If he arrests in a case in which arrest may be made on view, the view must be his view, and not that of someone else. Moreover, his powers being conferred by law they are defined and limited, and there can be no suggestion of holding him out as a person possessed of greater power than the law confers upon him... A constable, therefore, when acting as a peace officer, is not exercising a delegated authority but an original authority and the general law of agency has no application.'

Whenever he performs any of the duties or exercises any of the powers as a member of the force, whether or not on the instructions of a superior rank, he is considered to be acting in his own right and by virtue of the plenitude of the powers vested in him under the law (see *Fisher v Oldham Corporation* [1930] 2 KB 364).

In sum, therefore, in absence of any evidence that the first respondent either sanctioned or approved the acts of his subordinates (or, alternatively, of any statutory provision permitting such a procedure) he could not properly be joined as a party to this motion, in so far as it seeks redress for breaches of any of the fundamental rights provisions of the Constitution. But it may well be argued, that this notwithstanding, the claim could be justified and is permissible, if the relief is confined to those declarations which relate to the first respondent's failure to disclose the names of the unnumbered policemen who had assaulted the appellant. For, if their acts were unlawful in the sense that they were unjustified, the appellant would clearly have a private law cause of action in tort against

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the actual perpetrators. In this regard the first respondent's response to the appellant's letter is somewhat puzzling, for (reasons of security aside) one would have expected the fullest co-operation from the head of the police, especially if he is satisfied, after such administrative inquiries as he may have considered appropriate, that any member of the force may have acted other than with propriety. Be that as it may, however, the procedure used to

enforce the claim for a declaration of a right to such a disclosure must be considered on its own merit. In effect, such a claim is in the nature of an order for the discovery of the names of those who were responsible for the assault. As regards its substance, it is unnecessary for me to decide whether the *ratio decidendi* in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1973] 2 All ER 943 is applicable. Suffice it to say that in my opinion a claim for such relief should be instituted by way of a writ of summons and not an originating notice of motion; for, whilst an action is the ordinary means by which the jurisdiction of the High Court is to be invoked (see Order 2), procedure by way of originating motion is only available where it is authorised by the rules of court (see Order 41, rule 1). And, needless to say, there is no rule enabling originating proceedings for discovery to be brought by way of motion.

In his submissions before Crane CJ counsel on behalf of the respondents had conceded that "if the men were unnumbered and had assaulted the appellant their actions would have been unlawful and tortious". He argued, however, that such acts would not amount to a breach of any of the fundamental rights and freedoms, as the men would have been acting in excess of their duty. He repeated this submission before us and referred to several cases which he claims support this proposition. In the Indian case, *Kharam Singh v UP* [1964] 1 SCR 332, the issue was the constitutional validity of certain acts of the police which had been done pursuant to administrative regulations which had been made for their guidance. In the course of his judgment on behalf of the majority of the Indian Supreme Court, Ayyangar J observed (at page 337) that –

> 'if the officials had over-stepped the limits of their authority they would be violating even those instructions given to them but it looks to us that these excesses of individual officers which are wholly unauthorised could not be complained of in a petition under article 32.'

This article it should be noted, like article 19 of the Constitution, is one of two provisions in the Indian Constitution which provides the procedures for the enforcement of the fundamental rights and freedoms which are guaranteed by that Constitution. In the case referred to the judge was examining the constitutional implications, if any, of the acts of individual policemen which were done by virtue of certain regulations, and not the implications of action by the police which were implemented in consequence of direct instructions which emanated from the senior echelon of the force.

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And the American case, *Barney v City of New York*, 193 US 430 (1902), to which counsel also referred does not throw any light on the issues before us as it was decided on an issue of jurisdiction. In that case the chief engineer of the board of the rapid transit commissioners had authorised a deviation from the proposed route of a rapid transit railroad tunnel then under construction under Park Avenue, New York, in violation of the route which had been approved by the board in certain plans and drawings. In a bill by one of the residents it was alleged that the proposed deviation and the action of the contractors in entering upon the land to effect it, were unlawful and unauthorised, forbidden by the relevant legislation which empowered the construction of the tunnel, and in violation of the due process requirements of the Fourteenth Amendment of the American Constitution. It was held that, as the acts of the engineer were in violation of the provisions of the State law and in opposition to its plain provisions, his action amounted to a breach of the laws of the State and were therefore justiciable in the State's courts. Accordingly, the federal circuit courts were bereft of jurisdiction. Counsel also drew attention to the distinction which the American courts have made between the acts of a public official *virtute officii* and those which were done merely *colore officii* (see *Pennoyer v McConnaughy*, 11 Sup Ct Rep 699, *Tindal v Wesley*, 17 Sup Ct Rep 770 and *Fitts v McGhee*, 19 Sup Ct Rep 869). He submits that on the facts of the present case the acts of the police, if unlawful and in excess of their statutory powers, must be considered as falling into the latter category. His use of American cases is a good example of the pitfalls and dangers so inherent in a too facile readiness to transplant and apply principles and concepts which have been fashioned in a different legal or constitutional matrix. In the American cases under reference the courts laid down the constitutional limits of the Eleventh Amendment, which (in effect) prohibited private individuals from instituting proceedings against any of the States of the United States. And the judicial conclusion which was reached was that that Amendment did not bar such proceedings against State officials for acts, especially of a tortious nature, which had been done by them pursuant to State legislation which was unconstitutional. It was these acts which were considered to have been done without lawful authority and therefore *colore officii*.

In sum therefore, I have come to the conclusion that there is little help to be had from the cases based on the American Constitution. However, the observations of Ayyangar J in the *Kharam Singh's* case [1964] 1 SCR 332 would have been extremely pertinent had the appellant's complaint related to unauthorised acts committed by individual policemen.

In any consideration of the nature of the acts of the police on the night in question it would be useful to bear in mind this fundamental concept, namely that a policeman (whether in the employ of a local or central government) is a servant of the State and a ministerial officer of the central government. In *Fisher v Oldham Corporation* [1930] 2 KB 364 the effect of dichotomous control of the police in England came under

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consideration. The Oldham Corporation, through their watch committee, were the police authority and employers of the police of the borough. They were sued for damages resulting from the action of their police; and the question for resolution was whether they, as the employing agency, were liable for the tortious acts of the police. In the course of rejecting the plaintiff's claim, McCardie J made reference to the common law status of a constable. He quoted a

passage from the judgment of Lord Blackburn in *Coomber v Berks JJ* (1883) 9 App Cas 61. That most eminent judge had had this to say (at page 67):

> 'I do not think that it can be disputed that the administration of justice, both criminal and civil, and the preservation of order and the prevention of crime by means of what is now called the police, are among the most important functions of Government, nor that by the Constitution of this country these functions do, of common law right, belong to the Crown.'

In the Australian case, *Enever v R* (1906) 3 CLR 969 the question for consideration was the liability of the State of Tasmania for damages for assault and false imprisonment by a member of the State's Police Force. Although the ultimate issue turned on the construction of section 4 of the Crown Reserve Act 1890, the members of the court all considered the relationship between the Crown (or State) and the police at common law. Their unanimous conclusion was that neither at common law nor by virtue of the Act was the Crown liable for the acts of the police in the exercise of their statutory or common law functions (see also *Attorney-General of New South Wales v Perpetual Trustee Co Ltd* [1955] 1 All ER 846).

As the common law of Guyana is the common law of England (see section 3 of the Civil Law of Guyana Act), in the absence of any statutory provision to the contrary the position of the State *vis-à-vis* members of the police force in this country must necessarily be the same. Accordingly, the State would not be liable at common law, for wrongful and unlawful acts committed by members of the police force during the course of the execution of their duties. Therefore, one must now turn to the Constitution (ie the 1966 Constitution) to determine whether this common law position has in any way been affected by the fundamental rights provisions so as to make the State liable in any circumstances for the wrongful action of the police. The relevant provisions are contained in articles 3 to 15 inclusive. Article 3 takes the form of a preamble. It recognises and acknowledges that, subject to respect for the rights and freedoms of others and for the public interest, everyone in Guyana is entitled to certain stated fundamental rights and freedoms, namely (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation. Then follow specific provisions which deal with the nature of the several rights and

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freedoms and their limitations in the public interest and that of other members of the community. It is the right to those freedoms which is contained in articles 12 (protection of freedom of expression), 13 (protection of freedom of assembly, and association), and 14 (protection of freedom of movement) that the appellant claimed was violated. But before us counsel on his behalf contended for the breach of still another right. He argues that the evidence on which Crane CJ acted also revealed a breach of article 5 which guaranteed protection of *the right to personal liberty*.

The contention in support of the alleged breaches is premised on the presumption that the action of the police was unlawful. If they had no legal right to require or (as the circumstances seem to suggest) to compel the appellant to remove himself and his car from where they were, then, as he was at the time carrying on a discussion with his fellow practitioner and another, both his freedom of assembly and his freedom of expression were violated. Additionally, the same facts and circumstances amounted to a violation of his freedom of movement and also of his right to personal liberty. As I have already said, in my opinion the action of the police was unjustified. They had no reason to connect the assembly outside the Campbellville government school with the appellant and his companions, who were some distance away. They were not part of that assembly, which I shall assume could properly be considered to be a public meeting and one which (from the very circumstance) was unlawful as not having been notified to the police in accordance with the Public Order Act. Even on this assumption (together with the further assumption that the discussion between the appellant and his friends was concerned with the methods used by the police in the dispersal of the crowd in and around the school), the important question must be whether the action by the police as it related to the appellant can be said to have affected his constitutional rights. It will be remembered that their initial action was taken without any warning or intimation that they desired the appellant and his friends to remove themselves. The policeman merely held the appellant's arm, spun him around and demanded to know the owner of the parked motor car. On being told, he sought to know the appellant's reason for being on the roadway. During all this time he continued to hold the appellant's arm; and when the latter replied that that was his personal business, greater pressure was applied. Other policemen arrived and one struck him with his regulation staff. And it was only some moments afterwards that the appellant was ordered into his car.

In my opinion, the right of the police to disperse those who were at a place which was some distance from the appellant did not give them a *carte blanche* authority to remove all persons who were found standing on Sheriff Street, unless they had reason to apprehend a breach of the peace by those persons. And in this latter regard it is apposite to recall the words of Lord Parker CJ in *Piddington v Bates* [1960] 3 All ER 660 at page 663. He reminded that the mere statement by a constable that he anticipated

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a breach of the peace was not enough. There must exist proved facts from which the constable could reasonably have anticipated such a breach. In the present case, other than the erroneous statement by the first respondent in his affidavit that there was an unauthorised procession threatening a breach of the peace, there was a total absence of

evidence of any behaviour either at the scene of the dispersal of the crowd, or in the immediate vicinity of that happening which involved the appellant and from which it could be said that there was any threatened breach of the peace. But a further question still remains. Were the police acting by virtue of their office and in pursuance of their statutory or other powers, or were they merely using their office for some unlawful purpose?

In my opinion, their actions must fall within the former category for it is clear that, in an appropriate case, not only are they clothed with ample powers to disperse a public meeting of which no notice had been given, but also to take similar action whenever they apprehend that a gathering, whatever its size, may result in a breach of the peace or was otherwise unlawful. When they caused the appellant to remove from Sheriff Street they were not exercising a power which was outside their legal competence and so unauthorised. Their actions can only be open to challenge because of their mistaken view of the circumstances prevailing at the relevant time.

As I have already pointed out, such action on the part of the police would make those who were actually responsible liable in an action for unlawful assault. And in the present case, it would appear that it was primarily because of the refusal of the first respondent to divulge the names of those concerned that the appellant felt constrained to launch a constitutional motion. The next question, therefore, is whether such a course was open to him?

In *Director of Public Prosecutions v Nasralla* (1967) 10 WIR 299, in a reference to Chapter III of the Jamaican Constitution (which contains a preamble which is similar to that in Chapter II of the Guyana Constitution) the Privy Council noted (at page 303) that:

> 'This chapter ... proceeds on the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law.'

And in *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)* (1978) 30 WIR 310 in a reference to the comparable provisions of the 1962 Constitution of Trinidad and Tobago, Lord Diplock drew attention to a similar view which was expressed by the Judicial Committee in *de Freitas v Benny* (1975) 27 WIR 318 at page 320, in their consideration of Chapter I of that Constitution. That chapter (as with Chapter II of the Guyana Constitution and Chapter III of the Jamaican Constitution) provided for the recognition and protection of fundamental human rights and freedoms. As to the nature of these rights and freedoms Lord Diplock had this to say (at page 318):

> 'Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in section 1 already existed, it is in their Lordships' view clear that the protection afforded was against contravention of those rights or freedoms by the State or by some other public authority endowed by law with coercive powers. The chapter is concerned with public law, not private law. One man's freedom is another man's restriction; and, as regards the infringement by one private individual of the rights of another private individual, section 1 implicitly acknowledges that the existing law of torts provided a sufficient accommodation between their conflicting rights and freedoms to satisfy the requirements of the new Constitution as respects those rights and freedoms that are specifically referred to.'

In *Ramesh Lawrence Maharaj's* case a judge of the High Court of Trinidad and Tobago had committed a barrister to prison for contempt of court, without making plain to him the particulars of the specific nature of the contempt with which he was charged. This order was set aside by the Privy Council in *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 1)* (1976) 29 WIR 318 and, in the 1978 case, the question for determination was whether this omission on the part of the judge was a contravention of the appellant's rights under section 1(*a*) of the Constitution of Trinidad and Tobago. This provision concerned the right of the individual not to be deprived (inter alia) of his personal liberty, except by due process of law. Lord Diplock noted (30 WIR at pages 318, 319) that the order of the judge committing the appellant to prison was made by him in the exercise of the judicial powers of the State and his detention pursuant to that order amounted to a contravention by the State against which he was entitled to protection. And he went on to state (at page 319) that–

> 'whether it amounted to a contravention depends on whether the judge's order was lawful under the law in force before the Constitution came into effect.'

The present case is not concerned with the act of an individual policeman, but rather the concerted action of a group of policemen centrally directed and under the command of very senior members of the force in whose presence the acts were committed. In my opinion, such action was in the purported exercise of the executive power of the State. Their requests to the appellant and his companions to remove, and more especially the action taken in pursuance of that request, were unlawful acts as there was no evidence of any present apprehension of a breach of the peace. Nor can it be said that the presence of the appellant and his friends and of the motor car on the road amounted to a public or common law nuisance. For as has been observed in *Pratt and Mackenzie on the Law of Highways* (21st Edn) page 112, such a nuisance is a wrongful act or omission upon or near a highway whereby the public are prevented

from freely, safely and conveniently passing along the highway. It is always a question of fact and must be supported by evidence. There was no such evidence in this case.

But I must return to the crucial question, ie whether the acts of the police amounted to a breach of any of the fundamental rights and freedoms set out in the appellant's motion. I shall begin with article 14 which is concerned with the freedom of movement. The relevant portion reads thus:

> '(1) No person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Guyana, the right to reside in any part of Guyana, the right to enter Guyana, the right to leave Guyana and immunity from expulsion from Guyana.'

As regards this article the specific complaint of the appellant is that he was hindered in his "right to move freely throughout Guyana". But the real issue must be whether this article encompasses the right of locomotion along the highway. In my opinion, it does not. The right of locomotion along the highway, ie the right to pass and repass along a highway together with the incidental right of short stoppages, is conceptually and qualitatively of a different nature from the right to move freely about the country. Inter alia, what article 14(1) guarantees is the right of all citizens to go wherever they like within the country, subject to the exceptions contained in the succeeding paragraph. It is distinct from the common law right which is vested in every individual to use the highway *eundo et redeundo*.

Further it should be noted that whilst other articles of the Constitution speak of a hindrance in the enjoyment of a particular right or freedom (see articles 11, 12 and 13), article 14 is concerned with the deprivation of such a right. In my opinion a deprivation connotes a debarment from enjoyment whilst a hindrance is more in the nature of an obstruction or interference. And what transpired on Sheriff Street could not be said to be a deprivation of the appellant's right to move freely throughout the country.

The second breach of which the appellant complained is his freedom of expression. In this regard it will be remembered that he said that at the time of the police intervention he and Mr Chang were exchanging views on the action of the police in dispersing the crowd. The relevant portion of article 12, which protects such a freedom, reads as follows:

> '(1) Except with his own consent no person shall be hindered in the enjoyment of his freedom of expression; that is to say, his freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence.'

It is clear that the action of the police was directed to getting the appellant to remove from where he was. This was their only purpose. If

perchance the appellant and Mr Chang were at the time carrying on a discussion, this was merely coincidental, as the direct purpose and intention of the police was clearly not intended to abridge or otherwise affect this right. Additionally, the request to remove could not in any way have precluded them from carrying on their discussion elsewhere. Indeed, there is no evidence that the police even knew that the appellant and Mr Chang were having a discussion. But this aside, in my opinion article 12 is not directed at the fleeting discussion which two persons may have from time to time when they chance to meet on the street. In my opinion the view which was expressed by the majority of the court in the Indian case, *Kharam Singh v UP* [1964] 1 SCR 332, namely that in dealing with a fundamental right such as the right to free movement or personal liberty that only can constitute an infringement which is both *direct* and *tangible*, is as applicable to freedom of expression. And a similar test of the direct impact of the act was adopted by this court in *Hope and Attorney-General v New Guyana Co Ltd and Teekah* (1979) 26 WIR 233 and in the Australian case of *SOS (Mowbray) Pty Ltd v Mead* (1971) 124 CLR 529.

I now proceed to examine the appellant's complaint that the police action was in breach of article 13. As far as is relevant the article reads as follows:

> '(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or to form or belong to trade unions or other associations for the protection of his interests.'

The opinion which I have expressed as regards the appellant's claim under article 12 is as apposite to his claim under this article, namely that the action of the police was not directed to any such purpose. The insistence by the police that the three persons should remove themselves from their stationary position on the road can hardly ever be construed as a hindrance of their freedom of assembly or association. Nor can their acts be construed as an injunction against the appellant and his friends meeting together or associating with each other, or as amounting to any obstruction of either of these purposes. Indeed, there was nothing in the police action which prevented them from joining the appellant's car and continuing their association together elsewhere. I find myself unable to construe the

word “hindered” in article 13(1) as widely as to include every wrongful request by which the police order that persons should cease to gather in a given place. More specifically, however, the presence of the appellant and his two friends at the location from which they were required to remove was neither an essential nor even an optional prerequisite to the former’s right of assembly and association.

I come to the additional relief which counsel on behalf of the appellant for the first time sought to advance before this court. He submits that the facts deposed to in the affidavit in support of the motion as well as the

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evidence led clearly encompass a breach of the appellant’s right to his personal liberty as guaranteed by article 5. The relevant portions of that article of the Constitution reads as follows:

> ‘(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say: ... (*e*) upon reasonable suspicion of his having committed or being about to commit, a criminal offence under the law of Guyana.’

It should be noted that although the police action under section 3(4) of the Public Order Act to disperse an assemblage of persons at a meeting for which no notice had been given is not exempted under the article, such action would nonetheless be clothed with a general protection against constitutional challenge by virtue of article 18. This article saves and preserves the constitutionality of all written law as well as anything done thereunder, if the law had been in existence before the date of Independence (26th May 1966) and has continued in force and effect as part of the law of this country since that date. Such a law is the Public Order Act which was enacted on 14th December 1955. And in dispersing the meeting the police would have been entitled to use such force as was reasonable having regard to the prevailing circumstances. However, as I have already noted the police action could not have been justified under this law.

Personal liberty has been stated by Blackstone in his *Commentaries on the Laws of England* to –

> ‘include the power of locomotion, of changing situation, or removing one’s person to whatever place one’s inclination may direct without imprisonment or restraint, unless by due process of law.’

In this regard, I would construe the right of locomotion to include the right to tarry on the highway for a reasonable time. And in his work on *Constitutional Law* (9th Edn), Dicey described the right as “the right not to be subjected to imprisonment arrest or other physical coercion in any manner that does not admit of legal justification”. In other words, the concept contemplates not only the freedom of movement but also the inviolability of the person against all unjustifiable acts of trespass: “It is the antithesis of physical restraint or coercion”. Accordingly, the acts of the police in taking hold of the appellant’s arm as well as the other acts against his person, all done in the apparent pursuit of the general instructions given to them before they left their Brickdam headquarters, and in the presence of senior members of the force, amounted to a deprivation without just cause of the appellant’s right to his personal liberty as guaranteed by article 5 of the Constitution. They were all done in an effort to coerce him to remove from the spot where he and his companions had chosen to stand, but without lawful cause or excuse. They were, therefore, the very antithesis of the inviolability of the person. However, counsel for the respondents argues that as a breach of article 5 had not formed part of the appellant’s case in the court below, he ought not now

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to be heard to contend for such a breach. He referred us to *Perkowski v Wellington Corporation* [1959] AC 53 and *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623 in support of this contention. In the former case the action by the appellant was contested before a jury on the basis that her deceased husband was a licensee. The jury found in favour of the respondents. On appeal, counsel on her behalf sought to justify the claim on a submission that the deceased was not a licensee, but either an invitee or a person to whom the respondents as a local authority owed a duty of care. The court decided that as the point had not been taken at the trial it could not be taken on appeal. Part of the *ratio decidendi* of the Australian Court of Appeal was that, had the appellant not accepted that her husband had been a licensee, the issues put to the jury would have been somewhat different. The Privy Council refused to interfere with the court’s discretion in refusing leave. One of the cases referred to in that judgment was *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473. That was another Privy Council case in which it was held that permission to raise a new point of law should not be allowed –

> ‘unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plea.’

Commercial Plastics Ltd v Vincent [1965] 1 QB 623 was concerned with a contract in restraint of trade. The defendant had been employed by the plaintiffs as a plastics technologist to co-ordinate research and development in the production of their PVC calendered sheeting for adhesive tape. It was a condition of his contract of employment that he would not seek employment with any of the plaintiffs’ competitors in the PVC calendering field for one year after leaving the plaintiffs’ employment. The defendant on leaving that employment proposed to take up employment with a competitor. The plaintiffs accordingly brought an action to restrain him from so doing and for a declaration in

terms of the contract. The action was dismissed on the ground that the condition in restraint of trade was too wide. The plaintiffs appealed and counsel on their behalf sought to rely on an implied term or an equity as a ground for restraining the defendant from disclosing or using in the service of a competitor trade secrets or confidential information acquired by him in the service of the plaintiffs. This ground had not been mentioned in the affidavits which had been ordered to stand as pleadings, and was not relied upon or discussed or considered in the court of first instance. This new argument was rejected by the Court of Appeal on the ground that, had it been relied upon, the action would have had a different basis and character and probably other evidence might have been adduced.

In *Ameerally and Bentham v Attorney-General, Director of Public Prosecutions and Prem Persaud* (1978) 25 WIR 272, a case which was concerned with an alleged breach of a fundamental right, Crane JA expressed approval for the statement contained in *Basu on the Constitution of India*, namely that "facts relied on to rebut the presumption of constitutionality

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must be specifically set forth in the pleadings". In the present matter all the facts on which a breach of article 5 could have been founded had been pleaded and the evidence led in support of those facts was fully ventilated. What the appellant omitted to do was to include in his motion a specific claim for relief based on that article. It has not been suggested by counsel for the respondents that, had that specific relief been sought, new evidence would have been forthcoming or that the case would have been differently presented. In my opinion, therefore, this is a proper case in which leave should be granted to argue for the new relief.

But counsel for the respondents has raised still another issue. He submits that the original jurisdiction which is vested in the High Court by virtue of article 19 would not be exercisable if that court was satisfied that adequate means of redress were or had been available to the person concerned under any other law (see the proviso to article 19(1)). In this regard he drew attention to section 4(1) of the Police (Discipline) Act, and to a passage from the advice of the Privy Council in *Kemrajh Harrikissoon v Attorney-General* (1979) 31 WIR 348. Under section 4(1) any member of the force who is guilty of any unlawful or unnecessary exercise of authority, ie without good and sufficient cause makes any unlawful or unnecessary arrest or uses unnecessary violence to any person with whom he may be brought into contact in the execution of his duty, commits an offence against discipline and is liable to such punishment as may be imposed by the appropriate disciplinary authority created under the Act. Such punishment, counsel submits, is an appropriate alternative redress which ought to cause a court to refrain from exercising its powers under article 19 of the Constitution. And in order to re-inforce his contention he drew attention to the salutary warning issued by the Judicial Committee in *Kemrajh Harrikissoon v Attorney-General* (1979) 31 WIR at page 349. There the Board pointed out that:

> 'The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but *its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action*. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding

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> the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.'

With respect, however, and bearing the above *caveat* in mind, the provisions of section 4(1) of the Police (Discipline) Act, do not constitute adequate alternative redress. Indeed it cannot at all be said to be redress within the article. In *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)* (1978) 30 WIR 310 the court had cause to consider the meaning of that expression in the counterpart provision of the Constitution of Trinidad and Tobago; and the following opinion was expressed in the majority opinion (at page 320):

> 'What then was the nature of the 'redress' to which the appellant is entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the *Shorter Oxford Dictionary* is given as: 'Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this'.'

In my opinion "redress", in the context in which it is used in the article, does not contemplate punishment of the wrongdoer but rather some form of compensation or reparation to the person wronged; and in the present case this should take the form of monetary compensation.

As to the appropriate measure of such compensation I would again refer to the majority judgment in the *Maharaj (No 2)* case. It was said as regards compensation (at pages 321, 322):

'The claim is not a claim in private law for damages for the tort of false imprisonment (under which the damages recoverable are at large and would include damages for loss of reputation). It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include ... recompense for the inconvenience and distress suffered by the appellant during his incarceration.'

In my opinion the compensation in the present case must take into account the distress both physical and mental which the appellant must have suffered by the action of the police.

Accordingly I hold that the appellant is entitled to a declaration against the second respondent that his right to personal liberty as guaranteed by article 5 of the Constitution had been violated and to redress by way of monetary compensation, which I would fix at $100. The appeal in so far as it concerns the first respondent would be dismissed. In all the circumstances I would order that each party bear his own costs of this appeal and in the court below.

Bishop J. The incidents, of which the appellant complained, followed the dispersal by the police of the main body of people who had assembled to hear addresses by speakers of the Working Peoples' Alliance ("WPA"), a political party. The venue of the aborted meeting was

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Campbell Avenue and Delph Street, Campbellville, in greater Georgetown; and the date was 22nd August 1979, in the evening.

At the trial, the appellant and one witness, Mr Ian Chang, gave evidence. From their testimony, it would appear that the police were able to clear the road junction and immediate roadside; but groups of persons congregated in a schoolyard and in private yards along both streets. Standing in another street, Sheriff Street (which was several hundred metres away from the appointed meeting place), were the appellant, a barrister-at-law, in private practice, and his friend, Mr Ian Chang, a prosecutor in the chambers of the Director of Public Prosecutions. They were on the roadway and immediately beside the appellant's car, the greater part of which was off the road and creating no obstruction.

As the two lawyers stood there, discussing the conduct and attitude of the police, in respect of the crowd dispersal, which had taken place about half an hour earlier, the appellant was approached by a man in a police uniform and asked two questions: who was the owner of the parked car, and what was he doing there? The appellant resented the inquiry and said that it was no concern of his inquirer. Thereupon, the man laid hands firmly on the appellant who suffered abrasions to the inner aspect of his right arm, accompanied by tenderness.

Thereafter, a series of events occurred in rapid succession: the appellant advised the man that he was guilty of assault. He demanded his name, since he was wearing nothing by which he could be specifically identified. Another man wearing a helmet, marked "POLICE", then came forward from among twelve others and jabbed the appellant with a night-stick. None of the twelve wore identification numbers; but standing only six feet away was Carlton Bentick, a deputy Superintendent of Police, who appeared to be the most senior rank on parade. Also there were assistant Superintendent Rambarran and Ins Cort.

As the assaults continued, the appellant addressed the deputy superintendent thus: "Bentick, Bentick, you are standing there, you are seeing these men what they are doing". His reaction was: "Who you calling Bentick?". A spectator then told Superintendent Bentick that the appellant was a lawyer, but Superintendent Bentick remarked: "So what? We just lock up another one".

It should be noted, here, that Ins Cort, who was the only person to give *viva voce* evidence on behalf of the respondents, said that he drew Bentick's attention to the professional standing of the appellant and Mr Chang; but his narrative does not report Superintendent Bentick in a callous vein. Inspector Cort said:

'I told Mr Bentick that both Mr Chang and Mr Ramson [the appellant] were barristers. Mr Bentick then went to Mr Ramson who told Mr Bentick that he, Mr Ramson, was assaulted by one of his men. Mr Bentick told Mr Ramson to make a report to the police for further inquiries but that he could not stand where he was; that he must

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remove his car. Both Mr Chang and Mr Ramson went in the car and drove away.'

The appellant sought legal advice that very night and, on 10th September 1979, his counsel requested the Commissioner of Police, the first respondent, to disclose the names and regulation numbers of the personnel to whom he had assigned duties in or about Sheriff Street at the material time. The first respondent's response was a counter-proposal: he invited the appellant to submit a detailed report, if he had not already done so, in order that investigations could be initiated and pursued by the police. The appellant did not comply with the first respondent's proposition. Instead, he filed an originating notice of motion in the High Court, under article 19 of the Constitution, seeking declarations that his fundamental freedoms of assembly, association, expression and movement within Guyana had been violated.

Upon hearing the application, at first instance, Crane CJ held (28 WIR 191) that: (1) the assault on the appellant was not aimed directly at hindering him in the enjoyment of the fundamental freedoms, said to have been infringed, even though indirectly or consequentially it was instrumental in producing that result. Therefore, in terms of the Constitution, the assault did not "hinder" the appellant in the enjoyment of those freedoms; that the success of his motion depended on proof that the assault was committed with the deliberate intention of so hindering the appellant; and (2) great care should be exercised by the court lest the newly-created jurisdiction, enabled by article 19 of the Constitution, be misused to permit matters which properly fall within the purview and ordinary civil jurisdiction of the magistrate's court or the High Court to be presented as constitutional motions seeking redress.

The judge considered the motion to be misconceived for the reason that it was founded on the tort of assault, for which the State is not suable; nor could the State be made indirectly liable by the preferring of a constitutional motion against it, alleging a contravention of fundamental freedoms.

Within the context of the foregoing pronouncements, there are two momentous statements, one by the appellant and the other by Ins Cort, which call for serious consideration, in due course.

First, the appellant, in his evidence-in-chief, explained why he had proceeded by constitutional motion. He said:

> 'I caused [the first respondent] to be written a letter as set out in paragraph 12 in my affidavit. I did not get the information requested in paragraph 12 and that prompted me to bring these proceedings. It was my intention to proceed against the unnumbered policemen. I intended to do so and that is why I have brought these proceedings in their present form.'

That passage clearly reveals that the appellant never originally contemplated approaching the court in its newly-created jurisdiction, under

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article 19 of the Constitution and that he would have instituted ordinary proceedings, in tort, had he the relevant particulars of his assailants; but, because he was unsuccessful in securing the information, he was constrained to proceed by constitutional motion.

The other statement requiring consideration is pertinent to the "direct impact test", as espoused in *Hope and Attorney-General v New Guyana Co Ltd and Teekah* (1979) 26 WIR 233. Under cross-examination, Ins Cort said, as regards the holding of the WPA meeting: "Our instructions from Brickdam headquarters were that no meeting, whether with loudspeaker or without loudspeaker, was to go on". The question, here, is: to what extent, if at all, was the experience of the appellant directly related to that directive from police headquarters. An equally vital question is: how did Crane CJ evaluate those facts prior to his applying the law? To these I will return presently.

Let me say, at the outset, that part of the difficulty which I experience, and which obviously confronted the trial judge, concerns the use to which the affidavits, sworn by the appellant and the first respondent, could properly have been put by counsel for the appellant at the trial, and by the judge himself in analysing the facts and circumstances and then making findings on them. The problem was discussed only at the address stage when, as Crane CJ observed, in his memorandum of reasons, that counsel for the appellant *surprisingly* submitted that, in view of the fact that *viva voce* evidence had been led on both sides, in addition to the affidavits in support of the motion and the reply thereto, the trial judge should have excluded the affidavit evidence and relied solely on the *viva voce*. In underlining the element of surprise introduced by the appellant's counsel, the trial judge said (29 WIR at page 194):

> '*In limine*, counsel for the [appellant] merely intimated to the court that he considered there was a *conflict on the affidavits* and it would be necessary to lead oral evidence to resolve it by calling Mr Ian Chang. To this course, counsel for the respondents offered no objection." [*emphasis supplied*]

The trial judge, in his memorandum, shows how he approached the matter. He considered two decided cases, *Lovell v Wallis* (1883) 53 LJ Ch 494, and *Christian Catholic Church v Jeffrey* (1959) 1 WIR 386 and then said (29 WIR at page 194):

> 'I am entitled to look at both affidavit and oral evidence, particularly as [counsel for the appellant], in the course of the hearing, as the record shows, has made copious allusions to both affidavits in support of his argument. It therefore seems to me that the objection taken to the use of the affidavit evidence was a *veritable afterthought*, especially as it was made only at the address stage of the hearing." [*emphasis supplied*]

Significantly, at the hearing of the appeal, Mr B O Adams, senior counsel for the appellant, sought and was granted leave to argue ground 2 first. That ground reads:

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> 'That the trial judge misdirected himself by relying, as he did, on the affidavit filed by the respondents and sworn by Lloyd Barker [the first respondent], although the hearing proceeded on *viva voce* evidence.'

Senior counsel then made a number of observations. (1) That the said affidavit was founded substantially on *information* and *belief*, themselves factors constituting hearsay. (2) That, in that affidavit, the first respondent gave no basis for the information and belief on which he so positively relied. (3) That, save and except for interlocutory applications, a deponent is restricted to those matters which he can prove of his own knowledge; that, in any event, the first respondent did not give evidence. (4) That the proceedings before the High Court were not interlocutory in nature. (5) That the trial judge, in his analysis of the facts before him, did not warn himself that the affidavit of the first respondent contained hearsay. (6) That the trial judge wrongly used the affidavit to find that there was an unauthorised procession and that, in the circumstances, the police action was *intra vires*. (7) That the *viva voce* evidence of Ins Cort did not support the first respondent's information and belief; nor did he give evidence of an unauthorised procession. And (8) that it was important to notice that the respondents recognised that *viva voce* evidence was necessary but scrupulously decided that neither the Commissioner of Police (the first respondent) nor the deputy superintendent, Bentick, would do so. Instead, they selected the lowest of the ranks, other than the ordinary policemen, Ins Cort, to testify.

Senior counsel urged that for the foregoing reasons, apart from any others that were available to the appellant, the judgment of Crane CJ should be reversed; and that the declarations and damages sought should be granted. In support of his arguments affecting the affidavit and the use to which it was put by the trial judge, Mr Adams (counsel for the appellant) cited the following English Rules of the Supreme Court, Order 8, rules 1 to 5, Order 38, rule 2, and Order 41, rule 5, from the *Supreme Court Practice* (1967), Vol I; also *Kerr on Injunctions* (1905) page 560.

For the respondents, Mr Julian Nurse Senior State Counsel, argued that there was no merit in the submission that the trial judge relied on the affidavit of the first respondent to the prejudice of the appellant. Mr Nurse urged that the judge, according to his memorandum, did more than Mr Adams was prepared to give him credit for: the judge had studied the affidavit of the appellant and that of the first respondent, as well as the oral evidence. Moreover, Mr Nurse said, a perusal of the memorandum would not disclose that any part of the first respondent's affidavit, based on *information* and *belief* was used to assist the judge in arriving at his decision; nor did he make a finding that there was an unauthorised procession.

As respects the statement of the trial judge that the atmosphere "was already charged with and prone to violence", Mr Nurse suggested that it warranted the construction: there was tension in the air.

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In direct response to the submissions made by counsel for the appellant, Mr Nurse tendered the following points. (1) That, assuming but not conceding, that hearsay evidence was made use of by the trial judge, objection to the use of the hearsay content of the affidavit should have been made early in the trial and not at the address stage: *R v Banks* [1972] 1 All ER 1041 at page 1046. (2) That an affidavit containing hearsay becomes inadmissible, in that respect, only when it is read to the court: Rules of the High Court, Order 34, rule 1. (3) That objection that the affidavit of the first respondent contained matters, based on information and belief, should have been made at the time of the actual reading of the affidavit or when it was deemed to have been taken as read. (4) That counsel for the appellant objected belatedly, at the trial, to an aspect of the affidavit but not to the hearsay. (5) That counsel for the appellant, not having objected to the affidavit at the appropriate time, and having himself made use of it, must be taken as having waived his right to any valid objections he may have had to the affidavit or aspects of it: *Gilbert v Endean* (1878) 9 Ch D 259. (6) That the affidavit of the first respondent was filed to reveal his state of mind, and not to prove the truth of what transpired on 22nd August 1979 in Campbellville: *Subramaniam v Public Prosecutor* [1956] 1 WLR 965. *Cross on Evidence* (4th Edn) (1974) page 402. (7) That the proper course, with respect to inadmissible evidence, in an affidavit, is to strike it out: *Rossage v Rossage* [1960] 1 All ER 600. (8) That if evidence, based on information and belief, remained on the record because of failure to object to its admissibility, at the proper time, the omission operated as a waiver of the objection. (9) That objection can be raised to hearsay, in an affidavit, if it can be shown that the trial judge made use of it to the prejudice of the appellant. The fact that hearsay is on the record is not, in itself, enough. (10) That the onus is on the appellant to show that the trial judge wrongly used the affidavit. (11) That whether or not objection is made at the proper time, or not made at all, the judge hearing an originating motion, as in the instant case, has a discretion to allow the statement that is based on information and belief to remain on the record: *Re J (an infant)* (1960) 1 All ER 603. And (12) that the mere fact that evidence based on information and belief, remains on the record, cannot be used to reverse the decision of the lower court.

Then, finally on the subject of the first respondent's affidavit, Mr Nurse submitted that the vital question for this court is: how damaging was the hearsay? He proposed that the decision of the trial judge could be upset only: (13) (a) if, as a matter of law, the affidavit evidence was inadmissible; (b) if the trial judge based his decision on that inadmissible evidence; and (c) if the evidence was prejudicial and irrelevant. And (14) That hearsay evidence in any affidavit, filed in support of an originating motion, is in the final analysis admissible if it is tendered for the purpose of explaining the conduct of the deponent; that the purpose for which the statement is tendered is crucial to a ruling concerning its admissibility: *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 and *R v Willis* [1960] 1 All ER 331.

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In summary form, I have repeated the arguments addressed to this court by counsel on both sides and, in doing so, I am certain that I have attracted attention to the importance which the affidavit of the first respondent, in particular, held during the prosecution of this appeal.

An affidavit is a written statement made on oath before a commissioner of oaths or other person authorised to administer oaths. Affidavits are used for several reasons, including the recording of facts, circumstances and data, sometimes for presentation to a court, to be read and made an integral part of the trial and the evidence.

Courts of law trying *issues of fact* always prefer the *viva voce* evidence of witnesses to statements in affidavits, because the former affords the tribunal the unique opportunity to view and assess the reaction of the litigants and their witnesses, during the three distinct phases of their sojourn in the witness-box: examination, cross-examination and re-examination. It also permits tests, aimed at discovering fabrication rather than recollection, bias rather than fair-mindedness, and at revealing myriad manifestations relevant to a finding of creditworthiness or otherwise concerning the matter in issue. As said by Bayley J in the *Berkeley Peerage Case* (1811) 4 Camp 401 at page 405:

> 'Whoever has attended to the examination, the cross-examination, and the re-examination of witnesses ... has observed what a very different shape their story appears to take in each of these stages.'

Bentham considered cross-examination a security for the correctness and completeness of testimony (*Rationale of Judicial Evidence*, book II, Chapter IX, and book III, Chapter X) while *Wigmore* esteems it "the greatest legal engine ever invented for the discovery of the truth" (5 *Wigmore*, paragraph 1367). Consistent with the preference of the courts for viva voce evidence is a rule reinforcing that stance. Order 34, rule 1 of the High Court of Guyana states:

> 'In the absence of any agreement in writing between the parties or their solicitors and subject to these rules, the witnesses at the hearing of any action or at any assessment of damages shall be examined *viva voce* and in open court. The court may at any time, for sufficient reason, order that any particular fact or facts may be proved by *affidavit*, or that the affidavit of any witness may be read at the hearing on such conditions as the court may think reasonable, or that any witness whose attendance ought, for sufficient reason, to be dispensed with, be examined by interrogatories or otherwise by the registrar or a commissioner to be appointed by the court for that purpose; *provided* that where it appears to the court that the other party bona fide desires the production of a witness for cross-examination, and that such witness can be produced within such time as the court deems reasonable, an order shall not be made authorising the evidence of such witness to be given by affidavit.'

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In his originating notice of motion, the appellant indicated that in support of his application he relied on the grounds set out in his affidavit and "*may* seek leave of the court to call other evidence in support thereto". Then, at the opening of the trial, on 5th December 1979, his counsel (Mr Ashton Chase) stated that the affidavits of the appellant and the first respondent were in conflict, that it was necessary to have oral evidence, and that he proposed calling Mr Ian Chang as a witness "to resolve the conflict". To that course State Counsel, then appearing (Mr Nandram Kissoon) offered no objection. Indeed, the record of the proceedings does not disclose that he challenged Mr Chase's opinion that the two affidavits were in conflict. Whether Mr Chase thought, then, that someone other than the appellant was capable of resolving the conflict is not clear; but it transpired that after Mr Chang gave evidence, on the first day of hearing, the appellant himself testified on 17th December 1979, which was the second day of hearing. He did so without any objection or observation by State Counsel about the departure, by Mr Chase, from his earlier statement defining his strategy with respect to resolving the conflict. Further, it does not appear that the appellant was out of court when Mr Chang gave evidence. He was not obliged to withdraw; but his presence in court, then, was a factor relevant to the weight, if any, to be accorded his evidence.

The record does not report at what stage Mr Nurse entered appearance for the respondents, nor the stage at which Mr Kissoon took leave of the court or was excused. What seems clear, however, is that on the third day of hearing, 20th December 1979, Mr Nurse sought and secured an adjournment from 9.00 am to 1.00 pm to consider his strategy: whether or not he would call oral evidence.

At the resumption, Mr Nurse, it would appear, did not state what he would do but straightway called Ins Cort to give evidence. He was examined, cross-examined and re-examined; and thereafter the case for the respondents was closed, with no protest or request that the first respondent (the respondents' sole deponent) be called. He was the person to whom the appellant's lawyer had written a letter concerning the assault and of whom certain requests had been made for particulars. Greater still, it was the first respondent who, in his affidavit, had spoken of his information and belief, and made certain counter-proposals to the appellant's lawyer, with a view to investigating the occurrences of which the appellant complained.

Those matters apart, it should also be noted that, when the appellant gave evidence, he was asked by Mr Nurse several questions about an interview he had with the first respondent on the "issue of assaults by unnumbered policemen on individuals of the public". Those questions were eminently related, I would say, to the issues involved in the appellant's case and commended themselves for investigation at the trial. Yet, the first respondent (the Commissioner of Police) was never called, even for purposes of cross-examination; but whatever criticisms were offered of his affidavit came only at the address stage and to the utter consternation of Crane CJ.

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I have indulged in the foregoing review of tactics, adopted by both sides, in order to discuss *first*, how advisable was their procedure and, *secondly*, whether or not the trial judge had power to intervene to settle the steps by which the parties should have proceeded and, if so, *thirdly*, at what stage should he have done so.

It is patent, that having regard to the statement made by counsel for the appellant at the commencement of the trial, there was no agreement between opposing counsel that the *issues of fact* were to be determined by the affidavits before the court. As a corollary, there could not have been any agreement that the affidavits were to be read at the trial and treated as evidence. Some other method of proof was required and this was clearly recognised by counsel on both sides: that unless there is specific agreement that the evidence is to be by affidavit alone, admissible *affidavit evidence* may be supplemented by *viva voce* evidence, at the trial: *Phipson on Evidence* (10th Edn) page 621.

Yet, whose *viva voce* evidence it should be is not a matter which is left entirely to the will, choice or election of either counsel, since his opponent is entitled to interpose a request that the deponent of a particular affidavit should be called to be cross-examined. Order 34, rule 2 states:

> 'Evidence in support of an application or upon any motion, petition or summons shall ordinarily be given by affidavit, *but the court or judge on the application of either party may order the attendance for cross examination of the person making any such affidavit.* By leave of the court or judge to be obtained at the time of making the application, motion, petition or summons any particular fact or facts may be proved by the evidence of witnesses given *viva voce.*' [*emphasis supplied*]

Neither counsel sought to invoke Order 34, rule 2, and so the procedure, for the reasons which I have already traced, was never ascertained before or at the commencement of the trial, or regularised in reasonable time thereafter. It culminated, at the close of the case, in a submission which the trial judge did not anticipate, and to which Mr Nurse did not respond in his oral address, when he asked leave of the trial judge to submit the remainder of his address in writing.

It is trite that the court has always had jurisdiction after *hearing* the affidavits on both sides, and considering them unsatisfactory *to order* that their makers attend the trial to be examined *viva voce*, and to *refuse* an application to have the affidavits read. Such a situation arose in *Lovell v Wallis* (1883) 53 LJ Ch 494. There, the evidence in the action was, by consent, taken by affidavit; but when the action came on for trial before Kay J and the affidavits filed on behalf of the plaintiff and a *portion* of those filed on behalf of the defendants were read and considered unsatisfactory by His Lordship, he intervened and said that he would not allow any of the affidavits to be used, nor would he dispose of the case unless the deponents were orally examined, before him, in court. His Lordship then adjourned the hearing on two occasions to permit the attendance of the witnesses.

On the second occasion, the two Queen's Counsel (the one for the plaintiff, and the other for the principal defendants) questioned whether or not the court had power to exclude the affidavits. In the course of his ruling, Kay J cited the Rules of the Supreme Court 1883 (England), Order XXXVII, rule 1, which is *in pari materia* with our own Order 34, rule 1 and, after illustrating the injustice which unsatisfactory affidavits could produce, said (at page 496):

> 'The object of the court is to arrive at the truth. It seems to me probable that that will be best done by excluding the affidavit evidence. I know of no Act of Parliament or Order which obliges the court to accept it, and I am of opinion that *the court has sufficient authority over the proceedings before it to refuse to do so*. And, in order that the point may be raised in the most distinct possible form, I now *direct* that the witnesses who have given evidence in this case, and such other witnesses as the parties may think proper to produce, shall be, at the trial of this action, examined upon oath in open court; and that the affidavits which have already been filed shall not be used as evidence at such trial.'

Undoubtedly, a conflict of facts in affidavits, as clearly there was on a study of the affidavits of the appellant and the first respondent, is best resolved by *viva voce* evidence. As Sir Hugh Wooding CJ said in *Chamroo v Rookmin and Satnarine* (1968) 13 WIR 470 at page 471, albeit with reference to an affidavit in support of an originating summons:

> '... disputed issues of fact can only be properly resolved on *viva voce* evidence and no attempt should be made to resolve them on affidavit evidence only.'

As already shown, no attempt was made to settle the procedure by which the conflict of facts was to be resolved; and while I appreciate that an appellate court, as we are, far removed from the contest at first instance, with greater time to reflect on the issues than the trial judge, can and very often is able to employ hindsight to a matter, I doubt that it can be seriously challenged if I say that a commendable course, at the trial, should have been *first*, to argue, as a preliminary point, the extent to which, or at all, the contents of the affidavit of the first respondent were admissible in evidence and, *secondly*, to invite the trial judge to rule whether both the appellant and the first respondent (the Commissioner of Police) should be called to give evidence *viva voce*, if the ends of justice were to be served. It is

true that the appellant eventually gave evidence; but that was not consistent with what his counsel had previously indicated, nor was it the result of a ruling by the trial judge.

Clarification beforehand of the steps by which the parties should have proceeded was desirable, particularly in the light of later developments. In *Beevis v Dawson* [1956] 3 All ER 837 where, in a libel action, there was, inter alia, no ruling whether the plaintiff could give evidence in rebuttal, Singleton LJ, after observing that the question centred around the most

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convenient way of dealing with the matter in the interests of justice, and of the parties, and from the point of view of the court, said (at page 847):

> '*The judge ought to have been asked to decide early on the mode or manner in which the case should be heard.* If he had decided what was the most convenient in his view, counsel should have followed that. Instead, this quarrelling arose and there were continuous interruptions.' [*emphasis supplied*]

And, in *Dumas v Confederation Life Association* (1966) 11 WIR 73, which was an action for wrongful dismissal, the respondents pleaded justification and gave particulars of the acts or conduct of the appellant upon which they relied. At the trial, counsel for the appellant intimated in the course of his opening that the appellant would himself deal at once with the charges against him and that, after the respondents had tendered their evidence, he would call witnesses in rebuttal. The appellant, in putting forward his case, gave evidence touching each of the the respondents' allegations of misconduct. After the case for the respondents was closed, counsel for the appellant sought leave to call evidence in rebuttal of the respondents' charges. The judge refused the application and, in a considered judgment, dismissed the action. The appeal was dismissed. Sir Hugh Wooding CJ, in referring to the dilemma of counsel for the appellant said (at page 75):

> 'In my view ... it should not have been assumed that it was sufficient for counsel merely to mention the course he was intending to pursue: he should have gone further and, before opting, asked for express agreement or for *the judge to decide on the mode and manner in which the case should be heard*. To fail to do so was to take the risk of later refusal.' [*emphasis supplied*]

The legal authorities reviewed establish that, even where there is agreement that evidence will be by affidavit only, the trial judge is invested with authority to intervene if the contents of any affidavit before him do not subscribe to the standard which the cause demands. He has power to rule that the deficient affidavit be not read and that its deponent be called to be cross-examined on oath or affirmation before him, or on commission where appearance before him is proved to be inconvenient or impossible: Evidence Act, section 73; Rules of the High Court, Order 34, rule 12.

There may be occasions when, because of its sufficiency of "authority over the proceedings before it," the court may be constrained to *impose certainty in the procedure* where the procedure is tending to go awry, or where the Rules of the High Court are silent and no other rules can be called in aid to prescribe the mode and manner by which the parties are to proceed. This would seem to be the function of the court not only in relation to problems posed by affidavits before it but in respect of all civil proceedings, having regard to section 24 of the High Court Act, which states:

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> 'Subject to the provisions of any written law, the court may in any cause or matter make any order as to the procedure to be followed or otherwise which the court considers necessary for doing justice in the cause or matter, *whether that order has been expressly asked for by the party entitled to the benefit thereof or not*.' [*emphasis supplied*]

As the matter stood before Crane CJ, no ruling was invited nor any given; and there followed the formidable difficulties I find confronting this Court of Appeal.

The affidavit of the appellant in support of his originating notice of motion contained fifteen paragraphs, of which five were formal, while that of the first respondent contained fourteen, of which two were formal. In dealing with the specific allegations, the respondents, through the first respondent, constructed five paragraphs which were based on *information and belief*, emanating from representations made to him by deputy Superintendent Bentick who was not called as a witness to give evidence *viva voce*.

In effect, three of the five paragraphs contained a denial of the alleged assault, an assertion that the police acted "with civility" in advising the public against leaving their cars along Sheriff Street "which was *the scene of an unauthorised procession threatening a breach of the peace*". More particularly, the first respondent swore:

> '8. I am *informed* by Carlton Bentick, deputy Superintendent of Police, and *verily believe* that he did not join in the request to the [appellant] to remove his car, nor did he, in relation to the [appellant], issue any instructions to the members of the police force present or to any other persons.

9. Paragraph 9 of the [appellant's] affidavit is specifically denied. I am *informed* by Carlton Bentick and *verily believe* that no acts of violence were committed against the [appellant] by members of the police force *during the course of their duty whilst requesting the [appellant] to remove his car from Sheriff Street*.' [*emphasis supplied*]

When these paragraphs are compared it will be seen that, in paragraph 8, the first respondent's thesis is: if there was a request made to the appellant to remove his car, Superintendent Bentick (the most senior police officer on parade) never issued the order, nor was he associated or to be associated with such a request. For my part, if that interpretation is correct, I ask myself why, in the light of the appellant's allegations, did Superintendent Bentick truly display such aloofness when, in paragraph 6 of the very affidavit, he caused the first respondent to believe that there was an unauthorised procession on Sheriff Street threatening a breach of the peace? Alternatively, was it that he was dissociating himself from anything being said and/or done to the appellant, because he felt that the perpetrators were acting improperly? I have used the term "perpetrators" because paragraph 8 is rather open-ended and leaves its reader compelled to indulge in conjecture as to whether the actors, in relation to the appellant, were members of the police force or "other persons".

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But alarmingly, in the very next paragraph, paragraph 9, the first respondent represents, on Superintendent Bentick's information, two situations which, even if they appeared unclear in the preceding paragraph, were no longer so: *first*, that members of the police force requested the appellant to remove his car from Sheriff Street and, secondly, that when they so acted, they were pursuing the execution of their duties. The result is that not only was there, before the trial began, a conflict of facts between the affidavit to the appellant, Charles Ramson, and that of the Commissioner of Police (the first respondent) but also a patent self-contradiction in the affidavit of the latter arising from what he was *informed* by deputy Superintendent Bentick and undoubtedly led by him to believe.

In Guyana, our Rules of the High Court are silent on the subject of information and belief; but, by virtue of Order 1, rule 2, of those rules, we are permitted to refer for assistance to the English Rules of the Supreme Court that were in force immediately prior to 23rd February 1970, the Republic Day of Guyana. The relevant provision is Order 41, rule 5(2) (England), which reads:

'An affidavit sworn for the purpose of being used *in interlocutory proceedings* may contain statements of information or belief with the sources and grounds thereof.' [*emphasis supplied*]

The rule regards, as "interlocutory proceedings", those which do not decide the rights of the parties. Experience has shown, however, that the distinction between an interlocutory and a final order is not always plain and definite. As said in *Odgers on Pleadings* (18th Edn) page 357:

'The decisions as to whether any given order is interlocutory or final are numerous and conflicting. *The test* sometimes applied is whether the application is of such a nature that whatever order is made thereon it must finally dispose of the matter in dispute; another test is whether the order as made finally disposes of the rights of the parties (see *Egerton v Shirley* [1945] KB 107).'

In *Gilbert v Endean* (1878) 9 Ch D 259, it was decided, inter alia, that proceedings, although interlocutory in form, may yet be considered final because they decide rights between the parties. See also *Bozson v Altrincham Urban District Council* [1903] I KB 547; *Rossage v Rossage* [1960] 1 All ER 600; *Re J* (*an infant*) [1960] I All ER 603; also the *Supreme Court Practice* (1970), Vol 1, page 554.

Different tests have been applied, from time to time, by the court, to determine whether an order is interlocutory or final. Lord Denning MR acknowledged this in *Salter Rex & Co v Ghosh* [1971] 2 All ER 865, where he showed (inter alia) that Lord Esher MR, in *Standard Discount Co v La Grange* (1877) 3 CPD 67, focused on *the nature of the application to the court*, whereas Lord Alverstone CJ, in *Bozson v Altrincham Urban District Council* [1903] I KB 547 thought that the appropriate test was the nature of the order made by the court. The result was that Lord Denning MR

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conceded that the distinction between an interlocutory and a final order is uncertain. For him, regard should be had to the nature of the application, in preference to the other test. Nonetheless, it is quite apparent that Lord Denning MR uttered no condemnation of the latter, when notice is taken of his statement ([1971] 2 All ER at page 866):

'Lord Alverstone CJ was right *in logic* but Lord Esher MR was right *in experience*. Lord Esher MR's test has always been applied *in practice*...' [*emphasis supplied*]

Even in interlocutory proceedings, the deponent, although allowed to make statements based on information and belief, must state his sources. Therefore his opponent is entitled to take objection to the affidavit if there is non-compliance with the rule. In *Jacker v International Cable Co* (1888) 5 TLR 13, it was held by the Court of Appeal (Lord Esher MR, Fry and Lopes LJJ) that, where matter has been improperly received in evidence in the court below,

even when no objection has been raised there, it is the duty of the Court of Appeal to reject it and to decide the case on legal evidence. And in *M'Hardy v Hitchcock* (1848) 11 Beav 93 at page 94, Lord Langdale MR, in considering whether a commission should issue for the examination of witnesses out of the jurisdiction, pointed out that it is the duty of the court to require all proper evidence.

As regards statements based merely on information and belief and their uselessness as evidence, Lord Alverstone said in *Re J L Young Manufacturing Co Ltd* (1900) 83 LT 418:

> 'I notice that in several instances the deponents make statements on their 'information and belief' without saying what their source of information and belief is, and in many respects what they so state is not confirmed. In my opinion so-called evidence on 'information and belief' ought to be *disregarded* unless the court can ascertain the source of the information and belief, or unless the deponent's statement is *corroborated* by a person who can speak from his own knowledge.' [*emphasis supplied*]

In the same case Rigby LJ spoke of the reception he gave such affidavits whether they were sworn in *interlocutory* or *final* applications. He said:

> 'The truth is that the drawer of the affidavit thinks he can obtain some *improper advantage* by putting in a statement on information and belief, and he rests his case upon that. I never pay the slightest attention myself to affidavits of that kind, whether they be used in *interlocutory* applications or in *final* ones, because the rule is perfectly general - that when a deponent makes a statement on his *information* and *belief*, he must state the ground of that information and belief.' [*emphasis supplied*]

In *Lumley v Osborne* (1901) 70 LJKB 416 at page 419, Wills J, on the very question of affidavits presented on information and belief being unsupported by grounds, said: "Now it appears to me that *that requirement* is *essential and of substance*, and cannot be said to be merely formal".

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As I understand it, "information" is knowledge derived or acquired from reading or instruction or gathered in any way, and therefore bears the implication of being unsystematised or emanating from hearsay, rather than from direct experience. The term "belief" connotes an assent of the mind to the recognition or acceptance of something as real or true. Indeed, philosophical investigations have tested and verified that beliefs are produced in several ways: by perception and introspection, memory, imagination, suggestion, communication, and reasoning. Belief may also be founded on trust and loyalty. In the *Modern Dictionary of Sociology* (1969) by Theodorson and Theodorson, the authors say:

> 'A belief may be based upon empirical observation, logic, tradition, acceptance by others or faith. Thus it is possible to speak of scientific and non-scientific beliefs.'

In sum, "belief" is assent to, or acceptance of, or concurrence in, the truth of propositions, statements or facts, or acquiescence in, the existence or truth of something.

The court whose task is to adjudicate on competing claims, interests and demands is obliged to pursue the truth relentlessly; to test the accuracy and efficacy of the information of witnesses or deponents, in order to ascertain whether statements, or declarations, are well founded and reliable. That is why I believe the court insists on a disclosure of the source *and* basis of the information and belief.

Some of the difficulties which the affidavit of the respondents presents have already been discussed; but I must return now to a passage, in the memorandum of Crane CJ, since it appears to state a finding of fact while he was hypothesising. He said, concerning Mr Chang and the appellant:

> 'In my view, *had* the police known the subject of [their] discourse, that alone would have been sufficient justification for ordering them to move on; that would certainly have been ample justification for fearing that a crowd might gather around them *in an atmosphere that was already charged with and prone to violence* and ample ground for holding that a *breach of the peace was likely to occur.*' [*emphasis supplied*]

The passage cited recognises, as Ins Cort conceded, that the appellant and Mr Chang were standing alone on Sheriff Street and having a private conversation; that they were not part of any crowd or gathering. For me, except for the violence committed on the person of the appellant, there is no *viva voce* evidence that there were any acts of trespass to the person or property or any other act that could be categorised as "violence". Even the affidavit of the first respondent is silent on the question of violence of any kind. There is no evidence of exchanges of clashes between the police and any members of the public, or that, when the police were dispersing the crowd, they had to use baton charges. There were no arrests. The appellant was not even charged for an offence referable to a breach of the peace. In those circumstances I respectfully beg to differ from Crane CJ and feel unable to hold that the atmosphere was already charged with

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violence when the police approached the appellant; nor is there any evidence that any member of the public was disposed to violence.

The order entered after the motion was dismissed reads as follows:

> '... upon reading the affidavit of [the appellant] ... and the affidavit of [the first respondent] ... filed on reply thereto: and upon hearing counsel for [the appellant] and for the respondents and the evidence it is ordered that this motion be dismissed with costs to the respondents.'

That order clearly reflects what Senior State Counsel said of the trial judge: that, inter alia, he read the affidivat of the first respondent. The main thrust of that affidavit was based on information and belief, and the contents were conflicting, as was shown when paragraphs 8 and 9 were compared. Further, paragraph 6, which was also one of information and belief, reported Sheriff Street as being "the *scene* of an unauthorised *procession* threatening a breach of the peace"; but nowhere does Ins Cort, or the appellant or Mr Chang corroborate the dependent, the first respondent, on such a state of affairs.

Information and belief formed a substantial portion of the respondents' reply. Those paragraphs were denials pregnant with problems: a self-contradiction and statements that were not corrobated by *viva voce* evidence. In my humble opinion, those paragraphs should not have been read and made an integral part of the trial: unless the rules of evidence are properly complied with, the whole justification for the use of affidavit evidence, instead of oral evidence is destroyed "at a blow". As said by Evershed MR in *Re Cohen (a bankrupt)* [1950] 2 All ER 36 at page 37:

> '... it is desirable that the court should state quite plainly that the rules of evidence must be properly observed. To depart from them may result in serious injustice being done to some individual who might suffer adjudication ... on material which turns out afterwards to be quite incorrect, and which should never have been accepted in the first instance ... Affidavit evidence can only be entitled to the same weight as oral evidence if those who swear the affidavits realise that the obligation of the oath is as serious when making an affidavit, as it is when making statements in the witness-box.'

That quotation from the judgment of Sir Raymond Evershed MR is not intended to be used in castigation or vilification of the first respondent who, I am convinced, was acting at all times on the data he received from deputy Superintendent Bentick, and on the advice of others. He was drawn into the controversy because he had command of, and responsibility for, the Guyana Police Force. He was not on the ground, in Sheriff Street, when the incidents occurred. He himself did not draft the respondents' affidavit; but it is in his name and was drawn at his request. Any references to him during the course of my judgment must be viewed against that backdrop.

It is quite true that Crane CJ did not make a specific finding that there was an *unauthorised procession* along Sheriff Street; nor did he say that there was not one. However, he did say that the acts of the police, that evening, would have been *intra vires* and justified in a number of hypothetical cases or situations. Yet, when all is said and done, there is no concrete set of facts, concerning the happenings of 22nd August 1979, that permits a finding that "the atmosphere was already charged with and prone to violence". It is evident that the police, following their directive from divisional headquarters, went to the venue of the proposed meeting prepared for, and ready to deal with, such breaches as might occur. Even the riot squad was there, but they did not go into action; nor did Ins Cort, in his *viva voce* evidence, speak of any incident whatever involving a breach of the peace. And so I doubt whether a discussion, *ex hypothesi*, was appropriate in those circumstances.

The only other place where there is a reference to a breach of the peace is in paragraph 6 of the first respondent's affidavit, which, as I said earlier, contained statements formed on information and belief that were never substantiated and were also hearsay. I would say, therefore, that since Crane CJ did not say that he expressly excluded the statements based on information and belief from his thinking when he read paragraph 6, and for the reasons I have already given, reinforced by the judicial decisions and authorities I have cited, it is *possible* that the appellant did not have full consideration, at the trial, of all the factors pertinent to the relief he sought. For those reasons, I hold that ground 1 of the appeal, ie that extraneous matter and matters on which no evidence was led were wrongly taken into account by the trial judge, has merit.

Let me add that I do not think a court can even be right in perpetuating the use of inadmissible evidence because counsel for the aggrieved party was the original transgressor. Evidence that is inadmissible never loses its characteristic, pungent odour where it was inadvertently or fallaciously introduced, or where there was a failure to object to it at the appropriate time or at all. As shown in *Jacker v International Cable Co* (1888) 5 TLR 13, the correct approach is that even when matter has been improperly received in evidence without objection, at the trial, it is the duty of the appellate court to reject it.

It is possible that, because of the views expressed by the trial judge when dealing with the hypothetical situations in which he felt the police would have been justified in ordering the appellant to move, he omitted to say *specifically* whether the appellant, when in company with Mr Chang was lawfully exercising certain of his fundamental rights. His not having said that, I am not in a position to say whether when he said (28 WIR at page 203):

'So I must conclude from the facts that the alleged assault on Mr Ramson [the appellant], which I will accept was committed in the manner described by him, was not aimed directly at hindering him in

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the enjoyment of his freedom of expression within the meaning of article 12; the assault did not 'hinder' him in a constitutional sense from speaking freely to his friend, nor did it hinder either of them from receiving ideas and information *from the speakers of the intended meeting* which the police had a short while before dispersed, even though indirectly or consequentially it was instrumental in having that effect.' [*emphasis supplied*]

he meant that, as the appellant and Mr Chang stood there on Sheriff Street on 22nd August 1979, they were, *as between themselves*, exercising their fundamental rights to receive ideas and information from each other without interference; but that when they were interrupted, it was not the deliberate intention of the police to hinder them from enjoying their *tête-à-tête.* Then a little further on, in the very passage, the trial judge seems to have taken the view that the source, from which the appellant or Mr Chang was capable of receiving ideas and information, was restricted to the speakers on the political platform at the meeting announced for that evening. While I accept that all roadside conversations are not contemplated to have the protection of article 12 which includes the "freedom to receive ideas and information without interference", there were special circumstances in the appellant's case which required close consideration.

Indeed, I would say that the *actual conduct* of the police that evening was relevant to the relief sought by the appellant, having regard to the *directive* they had received from divisional police headquarters, the fact that the appellant and Mr Chang were not in any crowd or gathering, but by themselves and relatively far away from the appointed venue of the proposed meeting, and the fact that the trial judge found that the police assaulted the appellant in the manner he described. Those facts were worthy of examination by the trial judge, in the light of juristic thinking that the police are by law endowed with coercive powers, and can be agents of the State. Indeed, Cassels J in *Wright v Sharp* (1947) 176 LT 308 said that a policeman does not act judicially but ministerially. And in *Fisher v Oldham Corporation* [1930] All ER Rep 96 McCardie J, after considering the position of the police constable in the Oldham Police Force pursuant to the provisions of the Municipal Corporations Act 1882, said (at page 101):

'Prima facie ... a police constable is not the servant of the borough. He is the agent of the State, a ministerial officer of the central power, though subject, in some respects to local supervision and local regulation. This is the view so clearly expressed in *Beven on Negligence* (4th Edn), Vol 1, pages 416 and 417, when referring to the question of the liability of local authorities for the negligence of the police...'

Not all acts of the police are acts of the State. Mainly, some are executed for the cause of *peace-keeping*, while others are done in pursuance of *law-enforcement*. Still, there are police activities devoted to

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police-community relations. Thus, the police are engaged in some activities that are not directly related to law-enforcement but which seek to uphold the welfare of the community. Therefore to view the police, s*olely* in terms of their having hostile motives, as some persons are wont to do, misses an important aspect of the philosophy that underpins that institution, and seeks to distort the role of the policeman in society.

Ordinarily, a policeman who exceeds or abuses his powers and causes loss or damage to a member of the public may personally incur liability in tort: *Dumbell v Roberts* [1944] 1 All ER 326; *Christie v Leachinsky* [1947] AC 573; *O Hood Phillips's Constitutional and Administrative Law* (6th Edn) (1978) page 403. However, notwithstanding the foregoing statements in reference to police activities, I would say that the social setting in which the policeman operates, provides legal contexts, *at times*, in which he can be seen as discharging an executive function of a public nature, while being endowed by law with coercive powers: *Thornhill v Attorney General* (1979) 31 WIR 498. But because of the complexities, to which I have alluded, it is difficult for the courts to define the *precise* status of the policeman, and difficult to say, sometimes, whether his act is tortious or in contravention of the fundamental rights of a citizen, Each case, therefore, must turn on its own facts. And so it does not really matter whether, as in this case, the aggrieved party never originally contemplated instituting a constitutional motion but later changed his mind.

Pertinent to the events on 22nd August 1979 is the question whether the appellant was under any obligation to accept a full-scale investigation, as permitted under the Police (Discipline) Act. Crane CJ said that the appellant by electing to proceed in the High Court rather than at the Commissioner of Police's disciplinary inquiry "thwarted an investigation" into the acts of the unnumbered policemen and the opportunity to have them disciplined. But article 19 of the Constitution states:

'(1) Subject to the provisions of paragraph (6) of this article, if any person alleges that any of the provisions of articles 4 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(*a*) to hear and determine any application made by any person in pursuance of the preceding paragraph;

(*b*) to determine any question arising in the case of any person which is referred to it in pursuance of the next following paragraph: and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of articles 4 to 17 (inclusive) of this Constitution:

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Provided that the High Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of *redress* are or have been available to the person concerned under any other law..." [*emphasis supplied*]

The article makes provision for an actual or apprehended contravention of an applicant's fundamental rights and creates a new and special jurisdiction. It recognises that fundamental rights transcend common law ones, and that the hearing and determination of a constitutional motion for relief should proceed forthwith, once the affidavits in support of it disclose facts that, *ex facie*, are well founded and meritorious. There is *no condition precedent* that the applicant has to submit himself or his allegations for investigation by another court or tribunal. In *Ameerally and Bentham v Attorney-General, Director of Public Prosecutions and Prem Persaud* (1978) 25 WIR 272, Crane JA, in considering the implications of article 19(2), said (at page 312):

> 'When fundamental rights have been infringed, it is provided that the court 'may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of securing the enforcement of any of the provisions of articles 4-17 (inclusive) ...' But '*may*' above, means *must*, subject of course to the exercise of the court's statutory discretion in the proviso which must be exercised in determining whether 'adequate means of redress are or have been available to the person concerned under any other law'.'

And then in *Re Williams and Salisbury* (1978) 26 WIR 133 Crane JA cited the aforesaid passage and immediately said (at page 161):

> '... it is *immaterial* whether an applicant applies to the High Court for a remedy while a constitutional question has been raised in a *subordinate court*. It does not really matter whether a decision on the matter of referring it to the High Court is pending; *nor is it obligatory that the applicant should first wait the outcome of the decision before applying to the High Court for constitutional redress*.' [*emphasis supplied*]

It is true that the appellant did not avail himself of the opportunity that the Commissioner of Police was disposed to provide him, of appearing before the Commissioner of Police's disciplinary inquiry, but he was under no obligation to go there first or at all before approaching the High Court for constitutional redress. The commissioner's inquiry if pursued, had as its objective, the *discipline and punishment* of the police defaulters but nothing more.

Towards the end of his arguments, Senior State Counsel, in reply to this court, stated that on reflection he would say that the appellant was entitled to learn, from the Commissioner of Police, the names of the persons who assaulted him, even though he had no constitutional right to them. Counsel suggested that when the Commissioner of Police did not furnish the appellant's lawyer with the names of the policemen and

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the other particulars requested, the appellant was free to try to secure an order of *mandamus*. The point was not argued before us, or developed; and therefore I refrain from expressing an opinion, save and except to say that *mandamus* is a peremptory order issued by the High Court commanding the performance of *public duties* of persons, bodies, and inferior courts: R M Jackson, *The Machinery of Justice in England*, (5th Edn) (1971) page 41. The order is not issued as of right but is a matter for the *discretion* of the court.

The applicant for *mandamus* bears the burden of satisfying the court that he has a sufficient right or interest in the matter to demand the performance of the duty in question. But, the authors of *O Hood Phillips's Constitutional & Administrative Law* (6th Edn) (1978), page 629, state:

> 'An order will not be issued if an action in tort will lie, or if a more convenient procedure is available, or if some other remedy is provided by statute. It may be issued on the application of the Crown, or of a private individual who has a specific right or interest over and above that of the public generally.'

In *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118, *mandamus* was not granted on account of the commissioner's undertaking. Here, I have little doubt that the Attorney-General will follow likewise, in view of what Senior State Counsel said during the hearing of this appeal, and depending on its outcome.

If I am to apply *Jacker v International Cable Co* (1888) 5 TLR 13 wholly to this appeal, I will be required not only to reject, as I do, the matter which in my view was wrongly received and read at the trial, but to go further and decide the case on the legal evidence. I would say, however, that because of the complexities surrounding the status of the police, as their roles vary in quickly changing circumstances or situations, added to the problems which beset the trial for the reasons I have traced, the fact that a trial judge has several advantages over an appellate court in assessing the credit-worthiness of witnesses, and the fact that after earnest and sustained thinking, I am still not able to say whether or not the acts of the police on 22nd August 1979 directed by someone at divisional headquarters and

presumably superior to deputy Superintendent Bentick, were acts of the State, I would allow the appeal but order a new trial, in the interests of the parties, and in the public interest. In doing so, I appreciate also that the direct and indirect impact test has often proved difficult to administer: *Commonwealth of Australia v Bank of New South Wales* [1949] 2 All ER 755; *SOS (Mowbray) Pty Ltd v Mead* (1971) 124 CLR 529 at page 586. And so all the more I feel fortified in ordering a new trial at which the difficulties that attended the first trial ought to be avoided, thus leaving the trial judge in a better position, on the facts he finds, to apply the aforesaid test and state the results.

As was done in *Christian Catholic Church v Jeffrey* (1959) 1 WIR 386 by the Federal Supreme Court, the parties are to be at liberty to file such

pleadings as they may be advised. Further, as I do not think that the parties are free from blame in respect of the unascertained procedure at the trial, and for the difficulties that ensued, I would order that the costs of this appeal and of the first trial should await the result of the new trial.

Appeal allowed.