

NOTES FOR FRED MITCHELL

HOUSE OF ASSEMBLY

WITNESS ANONYMITY BILL

18 October 2011

Nassau

I wish to congratulate Brent Dean, the now Associate Editor of the Nassau Guardian, upon his appointment. He is a descendant of Fox Hill. His grandfather on his mother's side is Frank Edgecombe who was honoured by the Fox Hill community along with other elders of the community on what we call National Heroes Day. He was a Member of Parliament and Senator. His father was Basil Dean, who was a policeman's policeman who died last year. He has his father's personality; a steady guy with a stern countenance but an even temperament. I expect that this will translate into a better product at the Nassau guardian. I hope so because the media is integral to

what we have to accomplish in this country through our parliament. They are our partners. What we require is a balanced instrument, not one that is activated on motivated by prejudice and bias. I have been searching for a newspaper that simply records the facts, the paper of record that accords each point of view a hearing. We expect him to do good things.

In doing so I do also want to say thanks to the other political reporters and their bosses at The Tribune and The Bahamas Journal.

I wish to speak on behalf of the people of Fox Hill, who are suffering, have been suffering from crime and the fear of crime. Crime has struck that community and people are afraid. People have stopped sending their children on the parks because they are afraid they will get shot or attacked. Indeed, you will remember that Neil Percentie died in a hail of bullets in Reeve Street in Fox Hill.

On the 23rd of August I brought to the attention of the authorities the fact that in the days prior to that, shots had rung out as patrons were leaving the local

watering hole and they had to scramble for lives. I am bold to say that had appropriate action been taken that young Bahamian leader may still have been alive today.

In fact the reason why Urban Renewal was brought to Fox Hill was to deal with that issue of tit for tat murders. My experience is that it dampened the murders. It takes eternal vigilance. The programme is not now what the PLP envisaged. It is a shadow of itself and does not have the appropriate outreach to the community and the level of support from the community. We need Urban Renewal 2.0.

I listened to the Member for Marco City tell us that Urban Renewal did not stop the murders. He came armed with his charts and his statistics. What was that lies, damn lies and then there are statistics. We were told that in all areas except murder, crime has been on the downward trend. I wish he could tell that to the communities of Smithville, Cannon Pugh, St. Anne and Freddie Munnings Manor, or for that matter the village of Fox Hill proper where property

crime continues to plague residents and there is no effective redress available or answer. Then I asked myself also if the trend is downward, why are we have this debate and why are we passing these laws. Obviously the status quo should obtain, if the trend is downward.

Yes, we must take some coercive measure but as sure as night follows day that is not the only solution. The problem is we have never given the other measures an opportunity to work. We always stop in midstream or under resource the programmes. I am appealing to all who can hear to hear.

Today we debate another bill in a raft of legislation that threatens to change the landscape in the balance between the traditional and time tested rights of defendants and suspects and the powers of the state. This is not a new issue. It is an evolving issue that is part of the fabric of our constitutional democracy that says you have rights and I have rights. My rights

leave off where yours begin. They meet somewhere in the middle. And then there is the public interest. You will see this regime throughout our constitution which tries to codify the rights of fairness and decency and the exercise of power.

In the acien regimes, power was the only fact. Indeed that is what we are told was that the barons sought from King John: code of conduct that delineated the rights of the barons as it related to the king. If the classical history of western civilization is to be believed, we have been engaged in this struggle from time immemorial: how do we allocate rights and power. How do we protect the weak, the poor and the rich? How do we balance the rights of one against the other? How do decide what is in the public interest.

For us today, Parliament is having its say, to reflect on the people's behalf how that allocation between power, rights and the public inertest ought to be diffused. Ultimately, the arbiter of whether we have gotten it right will be a decision fro the courts. And I

need to say right now that courts are loathe to accept the ouster of their jurisdiction. I suspect then that much of what we pass today will have to stand judicial scrutiny.

We therefore have to ask ourselves whether or not this government has not come to the country with a false promise. Are they confusing activity with action. Confusing doing something about crime with passing laws. The two are not the same thing.

This is of course typical of this government: whenever there is doubt, whenever there is public pressure just pass a law. It doesn't matter if the law makes sense, if it can pass constitutional muster. Indeed, a former attorney general yesterday when speaking in this place from the side opposite dismissed that as lawyer talk. Interesting since lawyers run the country. So we cannot help lawyer talk. We cannot help lawyer talk because we pass laws here. But lawyer talk is really people talk, there are real lives involved in lawyer talk. Indeed, we have been reminded by leaders from the other side

that the issue of constitutionality is for the courts not for us.

We are here then to pass a law, having debated for two weeks now a number of laws which are to shift the balance of power toward the state and away from the individual. We are told that these are extraordinary times and so we must act. We must be careful, ever so careful how we accept this blandishment since the argument on extraordinary times has a history of being the last refuge of a tyrant.

We are told that these bills will fight crime. We are promised if not explicitly, then implicitly that if we pass these laws taking away the rights of individual defendants in criminal trials that this will lessen crime. So we must hold the government to that promise, even as we know from their history that theirs is one that promises much but delivers hardly anything at all. They are a very promising crew.

I think of some examples: the bill that we passed to lower the number of jurors from 12 to nine. That was passed in the face of the cry to do something about crime. We were promised that this would speed up trials and cause the justice system to move faster. The evidence several years later is that it has made no difference at all. In fact, we have now a hapless Attorney General and his equally hopeless and imported Director of Public Prosecutions who now say that they do not have enough people working for them in their office to bring things to court quickly enough.

This excuse comes not six months after the government came to parliament with the national budget and presumably this is something that is not new to them, and they did not provide or signal that this indeed was such a problem.

So is it because the government cannot hire prosecutors that we are now to redefine what is reasonable is by telling the courts that reasonable is

not what they say it is in all the circumstances of the case but that it is what Parliament says it is.

In the legal canons of construction of a statute, I had always been taught (and I admit that I am not as smart a lawyer as the right honourable gentleman who leads the FNM) that you cannot amend the constitution through the back door. In other words you cannot use an ordinary statute to change the constitution. There is a procedure laid down in the constitution for doing so. So the question one asks is whether or not the government is seeking to change the constitution through the back door by seeking to tell the courts what reasonable is in all the circumstances.

I say this because, most lawyers know and I have no doubt since the right honourable gentleman for North Abaco is wise and honourable he knows this as well, the case on appeal from to the Privy Council from Manutius in 1996 tells us that what the

constitution describes our state as a free and democratic sovereign state that comes with certain legal accoutrements. One of them is a judiciary that is free and independent of the executive and the legislature. That case is authority for the fact that when you want to change a fundamental right in a constitution you have to do it in prescribed manner. The manner prescribed by law.

So if you want to truncate the right to bail, eliminate it or eliminate jury trials, then you need to move to amend the constitution. You will need two third of each House and a simple majority of the population by referendum to support the proposition.

Of course, the state has the power to do what it likes. It has the police force, it has the defence force, it has immigration and customs, and it has the tax collectors. Each of those bodies who are tasked as investigative bodies under parts of the legislation on anonymity of witnesses have extraordinary powers to intrude into the lives of citizens. I often say to

those who are out in the streets shouting for executions and saying do away with the Privy Council that if the right honourable gentleman wants to hang someone he can do so tomorrow. He certainly has the power to do it. He has the apparatus to do it. But so long as we say that we are a country that subscribes to the rule of law then there is an inconvenient truth that we are limited by what the courts say what we can do.

This is where we should not be so cynical and fascicle as to come to Parliament with public policy that promises to deal with a problem when we know in advance that it will do nothing to solve the problem. Not only will the constitutional issues arise and become tortuous but the acts in and of themselves are only palliatives to make the public think that you are doing something, when you are actually doing nothing. In fact, that was the ingenuity of the comments of the Member for Marco City yesterday when he seemed to be saying just that. We have to do something. We have to send

out a signal that the society says that the penalties must be stiffer.

The second example that I would like to use of a promise that delivered in my opinion nothing was the plea bargaining act. This act was passed with great fanfare and it said how the court's calendar would be eased by the fact that defendants and the crown would now settle matters. Can the minister produce the evidence that this has had such an effect? When the bill was passed in this House I again told of my experience with these matters. That the bill was not needed to do a plea bargaining and that in fact, it would simply bugger up the works even more and slow down the process. I knew what I was talking about because I was working then on case and I could not get the crown to settle. In the end, the crown to answer. The man went ahead and pleaded not guilty and he was acquitted. And I thought in retrospect that it was fortunate for that man because the axiom in our courts is that you should take your chances and plead guilty because the record of success of the crown is so low in

convictions that you have a better than even chance off getting scot free.

So the promises of this government with new legislation have a history of being idle and those are but two examples. Good public relations. Sound and fury signifying nothing.

I cannot help but point to my statements in the year 2000 when fresh off the report of the crime omission headed by no less a person than the then chief justice

Sir Burton Hall, the right honourable gentleman came to parliament and abolished mandatory minimum sentences. He said then he made a mistake that discretion had been taken from the courts. And so the wrong that had been done with the blunt instrument that they had been warned about by me and others in the senate in the year 2000 was eliminated without any apology to those who had been wronged. No compensation. Not even whoops I'm sorry. Now we are back here again with mandatory minimum sentence, only this time with a twist. You know the song: just a spoon full of sugar

makes the medicine go down. This time the court will be given a range of opportunities to sentence from one lower sentence to a high sentence. But where is the empirical evidence that this is correct. Where is the crime commission report now or is that report entirely debunked.

No we feel the sting of public pressure so Parliament must be seen to be acting, this will fight crime. We know that this will do nothing to stop crime but it will ease the public conscience.

The instant bill before us falls into that category of doing something to stop crime.

Having said all of that however, the party in opposition has several choices in front of it. It could oppose the programme or the policy of the government. It could support the policy of the government unquestioningly. Or it could point out the issues, say to the government we will see and reserve the right to say I told you so but promising itself that when it comes to office it will do the right

thing and also urging the other branch of the government to scrupulously do its work in guarding the rights of the individual. Indeed the Chief Justice has already sent a warning shot by saying that the bail act must pass constitutional muster. All the more this present bill allowing for anonymous witnesses. That is the party's middle course and the one we take here today.

The witness bill will not allow the defendant to know who is accuser is. This is a fundamental right in law. You have to know who your accuser is. So the way the bill is set up: either during an investigation or during a trial, magistrate, the Supreme Court or the court of appeal can decide that the defendant may not know who his accuser is. It simply has to satisfy certain conditions, and those courts have to be substitutes for the defendant and as a surrogate for those defendants satisfy themselves that the accuser is deserving of that protection.

This goes back to what I have said about shifting the balance away from the rights of the defendant to the rights of the state. And presumably you are doing so because you are arguing that it is in the larger public interest.

Presumably, you are saying that in today's post 11 September climate there is a need where witnesses are being threatened, where justice is not being served to shift the balance. You know rights are being interfered with very day in this new climate. They are searching your private parts in airports, now we hear they are going to be questioning you as you pass through the airports to find where you are going, what you are doing and why you are carrying what you are carrying. From the pat down to the chat down. And this is to keep us safe and secure. So we are told that this is needed for justice to be served. We shall see.

(here discuss R vs. Davis from Britain and the constitution's protections)

Article 20 of the constitution says: If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law

2. Every person who is charged with a criminal offence-

a. shall be presumed to be innocent until he is proved guilty

e. shall be afforded facilities to examine in person or by his legal representative witnesses called by the prosecution before the court, and to obtain attendance and carry out the examination of witness to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

.. and except with his own consent the trial shall not take place in his absence unless...

(question ex parte determination of the anonymity of the witness)

Judgments - R v Davis (Appellant) (On appeal from the Court of Appeal (Criminal Division)) (back to preceding text) 14. R v Taylor and Crabb (unreported, 22 July 1994, Court of Appeal Criminal Division) was an appeal by Taylor and a renewed application

44. My Lords, it is axiomatic that the common law is capable of developing to meet new challenges. But threats of intimidation to witnesses and the challenge which they pose to our system of trial are anything but new. In theory, the common law could have responded to that challenge at any time over

the last few hundred years by allowing witnesses to give their evidence under conditions of anonymity. But it never did - even in times, before the creation of organized police forces, when conditions of lawlessness might have been expected to be far worse than today. Moreover, Lord Diplock saw the common law principle as so fundamental that he felt unable even to recommend that legislation should be passed to interfere with it. In these circumstances, while I am very conscious of the problems confronting the authorities which have led them to adopt these measures, in my view it is not open to this House in its judicial capacity to make such a far-reaching inroad into the common law rights of a defendant as would be involved in endorsing the procedure adopted in the present case. In effect, the ability of counsel for the appellant to cross-examine the decisive witnesses against him was gravely compromised. Similarly, for the reasons given by Lord Mance, the appellant's trial did not meet the standard required by article 6 of the European Convention. In the circumstances it is unnecessary to decide whether the decision in R v Murphy [1990] NI 306 is consistent with the common law.

45. It is for the Government and Parliament to take notice if there are indeed areas of the country where intimidation of witnesses is rife and to decide what should be done to deal with the conditions which allow it to flourish. Tackling those conditions would be the best way of tackling the problem which lies behind this appeal. Any change in the law on the way that witnesses give their evidence to allow for those conditions would only be second best. But Parliament is the proper body both to decide whether such a change is now required, and, if so, to devise an appropriate system which still ensures a fair trial.

Section 13 of the bill the first condition of any evidence should be whether it is relevant, probative, crucial before anything else is considered. If it does not cross that threshold then why are we discussing it.

Section 16 warning to the jury, precisely the problem “ give such warning as appropriate”
return to text)

What I thought ought to happen is couple of things. Let us accept that the law enforcement people have said that this is a new tool which can pass the test of being reasonably necessary in a democratic society and in the public interest. That is the constitutional test. I think that the timing of such a change should not be open ended. I think that it should be. Could be limited by a couple of things: a sunset clause. In other words, Parliament says that this legislation will expire in five years. At that time it will have the opportunity to be renewed if Parliament then thinks that given the experience that the mischief that it is to cure still requires it and that it has in fact worked well.

Secondly, and perhaps cumulatively, you could put in place a panel of the House, the Senate and civil society which is to review the practice of the law and how it is applied as a kind of oversight committee to ensure that there is no abuse of the law.

I think that those might be reasonable brakes on the power of the state in this case.

The larger issue is will it solve the crime problem. We will see.

What we do know is that crime cannot be solved unless there is social intervention.

You have heard us speak about Urban renewal 2.0. You have heard about the elements of the PLP's plan to fight crime. The use of the police in hot spots, the violence breakers programme, the national youth service. You have heard us say that we will double the investment in education with significant sums put into expanding the present programme and making sure that our youngsters can go to college.

I just came back from speaking to a number of them and to our Bahamians overseas. I am proud to say that we are being well served by the generation that is training overseas. Their minds are in far far better place than mine could ever be. They are in a position to help us and the society must embrace them, nurture them, take care of them.

But you know, our opponent said that this is all soft stuff, and I will remember that time in here when the Leader of our party was called wutless because of the situation with regard to bringing people to trial, now what would the Rt. Honourable gentleman call himself today. Physician heal thyself is what I say. Wutless aint the word. I would call this something else but it would be unparliamentary.

It is unadulterated cow manure.

You remember the night of the Elizabeth bye-election. The leader of the country on the stage with his cap backward, like the thugs. The teachers and parents telling their kids you should wear your clothes properly: pull your pants up, keep your shirt in your pants, where the cap properly, take that tags off your clothes. Tags on everything. And the leader of the country shows up with his cap backwards.

Stan Burnside told us the point when in his carton, he said with a parent talking to her son: "I don't care if the Prime Minister wears his cap backwards; you can't go outside with that cap on like that."

So when we give advice, we ought to think of our own conduct. The words of that address to the nation were like those of the sweet music man: we must work together, we must pull together. All fine but where were you when this side said that is what we must do. That was rejected out of hand in the crudest form fashionable and imaginable. That is the credibility bar which the side opposite has to cross.

The words flying have not stopped. Recently in this place, there was some banter from that side about the Member for Bamboo Town from the Member for North Abaco. North Abaco was amused at the prospect of the next generation fighting gladiators in the ring to see who was fit to lead. Interestingly the MP for Bamboo Town did not stop the Member for north Abaco dead in his tracks in the House. Later it appears he had second thoughts and lashed out at North Abaco and in the process lashed out at the Leader of this side who said nothing about him. He called him a wimp. This is surprising coming from the leader of the greens who is supposed to be from

a new generation who does not engage in that sort of thing or so they say. But it only goes to show that change is elusive. It's hard to change and the more things change, the more they remain the same.

We know that the male population is the problem. I have always said that that an apt is example is that of a factory owner whose operator comes to him and tells him productivity is down because there is section of the machine that is not working. You would then take your money and put it into fixing that part of the factory so that the production can get up and running.

And yet we know that it is the little boys the young males that are the problem. The women's movement is to be admired for one hundred years or more of fighting for their rights. Who is fighting for the rights of the young men in our country? Everything that we signal to them is that they are no good, that they have no future. And now it is proposed that 1 million dollars is to be spent on social intervention

programmes. That is ludicrous. I say here: either you spend now or you will pay later.

That is in part my answer to the discourse by the Member for Marco City who went to great and enthusiastic lengths last evening to convince us that crime is a matter of individual choice. I grant you some of that but that individual comes from a society which has a certain milieu, a certain background and history, a way it conducts its business. There is a connection between what the society does for the young that produces the individuals we see today.

I think that we can find much more to spend to help save our children. The investment in pre-school education. in scholarships at the tertiary level. I support the call made yesterday by the Member for West End about the legalizing of gambling. I support it one hundred per cent, with all due respect to those who take a moral position. I do not think that it is immoral to gamble. I do not gamble and

don't encourage it but if you want to gamble that is your choice. The law is observed more in the breach. There are millions of dollars of untaxed revenue out there that the treasury can collect but by hiding our heads in the sand on this gambling issue, the treasury is going wanting for funds and the social programmes that those funds can support.

What I see behind this effort, the policies of the government is the same right wing ideology that suggests that we should lock up the male population in order to buy peace in our society. They argue that this is what was done by Rudy Giuliani in New York city the sweeping incarceration of a generation of young men, and the crime stopped. Is this where we are headed?

We with an investment in the little ones today, a proper investment in them today, it will pay great benefits later on. With some attention paid to the young male population on issues of violence and self-esteem we will do wonders.

I want to take this opportunity before I sit then to say that I have been fighting this cause since at least the year 1986 when I returned to this country as an attorney. The society still doesn't get it. I have not had the power to do anything about it. Those who have the power must do something about it.

Nothing else will lessen crime. Anything you do that does not include attention to the young meal population will fail. You only have to look at the graveyard of Jamaica's public policy on crime to see that. Look what they are doing in Trinidad, suspending civil rights in a state of emergency and we know that that too will fail once the state of emergency is over because you must deal with the fundamental problem.

I look at the rise in poverty, the question of the banks and I hope that we soon have a protest against them for the way they are selling out people's homes from under them and not lending to get this economy going.

All of these contribute to where we are.

Unless we address the fundamentals we are headed to failure.

I have just returned from Central Africa where I chaired at the invitation of the Commonwealth, the Commonwealth Expert team observing the presidential elections in Cameroon. I wish to thank the Secretary General of the Commonwealth for his kind invitation to perform this service to the people of Cameroon and the Commonwealth as a citizen of this Commonwealth and as Caribbean man. I have joined the ranks of other former Caricom foreign ministers and heads of government who have performed this service.

I thank my colleagues for their support of the appointment and my constituents for their support in my nearly three week absence from the country.

I also attended the wedding of the daughter of Sir of Sidney Poitier in Los Angeles and wish to congratulate him and his wife Joanna and their daughter and her husband on their marriage. Sir Sidney's daughter Pamela lives in Cat Island.

In the process of my absences I had to forgo the opportunity to speak on behalf of my cousin Andre Mitchell, the son of my father's brother Eric at the wedding of his son Ari who work in the public service to Jessica Thornley. I thank my brother Ian for reading my remarks at an occasion in which family comes first. I mention that here today as a way of making amends and of wishing the new couple a happy life.

I am deeply conscious having now on the 5th October celebrated myself 58 years of a wonderful life of the eyes of the younger Mitchells who are watching and the young men and women who are watching me just as they are watching other members here today, and wanting to be where I am and be like us and do the things that I have done. Which is why it becomes doubly important for us to set the right kind of example in this place in which we serve. André has a grandson and one day he was passing in his truck with his grandson through Fox hill as I was canvassing he are. He turned around and said he wanted to introduce me to his grandson

because the grandson said we always hear you talk about Fred Mitchell being your cousin but he is never at any family function so he was not sure that his grandfather was actually related to me. And so I was introduced to the next generation of Mitchells. Congratulations once again to Ari and Jessica, Andre and Everista, Mrs. and Mrs. Thornley Jessica's parents. Ari who is a fine young man and I think will be good husband and father.

Which brings us then to the conclusion of this exercise. It is the family that will make the nation strong. Not these awls that we pass today. We must do what is necessary to make the nation strong by strengthening families. You can only do that by social intervention. Yes, coercion is necessary and the state must use coercion sometimes. I say the tail cannot wag the dog. You cannot have a situation where today mature men in my age set are cowering in the face of little 14 and fifteen year old junior high school boys; that cannot be and it must not be. It must and it will stop.

The Roman catholic catechism says this about the death penalty:

2266 Preserving the common good of society requires rendering the aggressor unable to inflict harm. For this reason the traditional teaching of the church has acknowledged as well founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity the death penalty. For analogous reasons those holding authority have the right to repel by armed force aggressors against the community in their charge.

The primary effect of punishment is to redress the disorder caused by the offense. When his punishment is voluntarily accepted by the offender, it takes on the value of expiation. Moreover, punishment has the effect of preserving public order and the safety of persons. Finally punishment has a

remedial value; as far as possible it should contribute to the correction of the offender.

2267 If bloodless mans are sufficient to defend human lives against an aggressor and to protect the public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.

When you read what the Privy Council has now said about the death penalty and revering it for the worst of the worst and the rarest of the rare then you see where that doctrine is grounded and headed. In a Christian ideal.

I note that the chief justice has now said that the CCJ is a natural evolution. But we should not fool people into thinking that by going the CCJ that this means that hanging will automatically restart. We must tell

the truth. We must also come face to face with our Christian heritage and our humanity which is practiced in the context of a secular state and not a theocracy. Politics cannot change that fact about me.

So we will take watching brief with this legislation. We hope it works but not at the expense of the rights of the individual. We think that the larger public interest lies in protecting the rights of the individual. At the same time we recognize the changing times. We will await the verdict of the courts and how the legislation works in real time.

Thank you very much indeed.

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