

1/2006

Before the Film and Publication Review Board

In the matter between:

United Independent Pictures

and

The Film and Publication Board

In re: Appeal in respect of the film: *Inside Man*
Award

Professor Karthy Govender

Introduction and description of the film

1. This is a fast-paced big budget thriller made for the commercial market by Spike Lee, and features Denzel Washington (Keith Frazier), Jodie Foster (Madeleine White), and Clive Owen (Dalton Russell). A band of bank robbers stage the perfect robbery, not for personal enrichment, but in order to redress historical wrongs and to punish a Nazi collaborator, Arthur Case, who unscrupulously benefited from dealings with the Nazis and who subsequently attained prominence in American society. In essence, the film is about retribution and being held accountable and responsible for past misdeeds.

Comment [MJM1]: Names checked on
imdb.com

2. Dalton Russell and his colleagues rob a bank in order to access a specific safety deposit box. The contents of the box link the founder and owner of the bank to the Nazi regime. The robbery is planned and executed flawlessly, with no one being killed or seriously injured, and the robbers escape with the contents of the safe deposit box. Evidence that will undeniably link the banker to the Nazis is left at the crime scene for Keith Frazier to follow up on. The film, like many others by Spike Lee, explicitly comments on social issues, and has a number of subliminal messages. There is a memorable exchange between a Sikh and the African-American, Keith Frazier. The Sikh laments the stereotypical response of people in the US in regarding all Asians as Muslims and, as a result, as a threat to US society. This is met by the riposte from Frazier that, at least as a Sikh, he can still hail a cab. Further, it is no coincidence that the American-African child is seen playing a violent video game, and is absorbed by the lure of those depicted in the games.

Decision of the Classification Committee, and the challenge to it

3. On the 8th March 2006, a three-person panel of examiners, by a majority, assigned the film a restrictive classification of '16' with classification advisories for violence and language. One of the examiners, Mr S.A. Tjempe, was of the view that a restrictive classification of '13', with consumer advisories cautioning about violence and language, would be appropriate for this film. He also requested that his minority decision be recorded. The Chief Examiner, Mr T. Couzens, in a detailed and reasoned report. acknowledged that this film falls in that difficult grey zone between the restrictive classifications of '13' and '16'. However. the frequent use of strong language and the infrequent scenes of violence were of such a nature that, in his opinion, it would be harmful for children of 13 to view such a film. He also made reference in his report to the somewhat dubious

Comment [MJM2]: Correct spelling?

moral message of the film, and questioned the effect that this would have on thirteen-year-olds.

4. United International Pictures appealed against the classification, arguing that the committee had erred in its classification decision, as the scenes of violence did not justify a restrictive classification of '16'. In their view this was a suspense thriller aimed at a general audience.
5. At the hearing before us on the 20th March 2006, the classification committee was represented by Mr T. Couzens and UIP by Mr Gerald Sobel. We are thankful to all the parties for the representations made. We are particularly indebted to Mr Couzens for his thoughtful, thorough, and well-prepared representations.

Preliminary Issues raised at the hearing on the 20th March 2006

6. Prior to dealing with the merits of the matter, it is necessary to deal with certain preliminary points made by Mr Couzens. He drew our attention to complaints that examiners are sometimes not arriving on time for classification duties, and placed on record that the examiners classifying this film arrived on time and performed their duties as required. Mr Sobel confirmed concerns about examiners arriving late, and indicated that he had complained about this. We were specifically invited to comment on this. It is unprofessional for persons to arrive late and delay processes. This is a matter that is within the jurisdiction and authority of the CEO of the Film and Publication Board. We can do no more than make recommendations. However, conduct of this nature, if widespread, can adversely impact on the entire administrative agency, including the Review Board. Urgent steps must be taken by the CEO to address this issue. It would be unacceptable for the Review Board to make detailed

suggestions as to the appropriate steps, but some urgent measures are needed.

7. Mr Couzens also took issue with the comment from UIP that the Classification Committee had “erred very badly in its judgment”. He stated that careful and detailed consideration had been given to the classification of this film, and that such a characterisation was both unfair and unwarranted. We are of the opinion that the decision of the Classification Committee was reasoned and considered. Even though we have arrived at a different conclusion from that of the Classification Committee, the Committee cannot be said to have erred badly in their judgment. We suspect that UIP intended to say that the decision was erroneous, but overstated their case.
8. The final preliminary point that has to be addressed concerns the yardstick or test to be used when deciding appeals. Mr Couzens suggested that the test should be what the reasonable person in the circumstances would have thought was an appropriate classification. He submitted that we should only interfere with the decision if we conclude that the Classification Committee acted unreasonably. Prior to reaching this conclusion, one should have regard to the experience and expertise of those making the determination.
9. As we have stated in earlier awards, the Film and Publication Review Board is an administrative appeals tribunal, and does not function simply as a reviewing authority as do courts of law when reviewing administrative action. Section 20(3) of the Films and Publications Act 1996 (as amended), provides:

The Review Board may refuse the appeal and confirm the decision in question, or allow the appeal, either wholly or in part, and give such decision as the Board or the executive committee should in its

view have given, and amend the classification of the publication or film... and may impose other conditions in respect of the distribution or exhibition of the publication or film.

Thus, when making a decision, the Review Board has to decide on the classification that, in its opinion, is the most appropriate. This follows from the description of its powers in section 20(3) of the Act. The name 'Review Board' is thus something of a misnomer. We do not have to ask the narrower question of whether the classification committee acted unreasonably. Had our functions been restricted to those of a reviewing tribunal, then we would, in most instances, have had to make a finding of unreasonableness if we wanted to set aside the decision of a Classification Committee. In our law, a reviewing tribunal is, in most instances, restricted to setting aside decisions and remitting them to the original decision-maker to make the decision. Administrative appeals tribunals, in contrast, are empowered to replace the decision of the original decision with a decision deemed more appropriate. Finally, reasonable people can quite easily come to different conclusions, especially in respect of the matters such as those under consideration.

The merits of the matter

Submissions of the Classification Committee

10. It was clearly the infrequent scenes of violence and the frequent use of strong language that persuaded the majority of the Classification Committee to decide on a restrictive age classification of '16'. In addition, Mr Couzens expressed concern about the demeaning treatment of the older woman who was required to strip, and about the theme of the film. He questioned whether the ends justified the means. Could a bank robbery, with the attendant terrifying consequences for the hostages,

justify the ultimate objective of punishing the Nazi collaborator? He argued that this question had particular resonance in the South African context, where bank robberies were a major social problem.

Description of and application of the legal principles

11. The four scenes that appeared to cause concern were:

- The beating up of the bank employee who concealed the cell phone.
- The violence portrayed in the video game.
- The staged graphic shooting of the hostage.
- The imagined shoot-out between the hostages and the police.

This is not a violent film. Each of the scenes listed above is portrayed in a context and manner that conveys a message, but without being unnecessarily gory. The beating up of the bank employee is not seen, but rather heard. The scene involving the video game explicitly conveys a broader message. The white bank robber expresses his disquiet at the games that children – in this instance an African American child – are exposed to. What is the ultimate cost of exposing children to these violent video games? We get the impression from this scene that the bank robber is not without redeeming qualities. The shooting of the hostage is graphic, but quick. In addition we later find out it was an illusion. The illusory shoot-out between the police and the robbers is much in the nature of a scene from a 'cowboys and Indians' film.

12. Many techniques are used to muffle the effects of the scenes containing violence. You get the impression throughout most of the film that Dalton Russell is relaying his tale from prison, and the retrospective interviews with the hostages confirm that they survived the robbery relatively

unscathed. One gets the impression throughout the film that the robbers are clever rather than being violent thugs. There are scenes that convey the impression that the robbers are compassionate. We see glimpses of the power that the security forces can bring to bear on a hostage situation. But it is obvious from the film that lateral thinking, and some old-fashioned deductive reasoning, are to be preferred to the might of New York's finest. Storming the bank would have resulted in many deaths and would have left unexposed greater misdoings. As the audience we are taken down both paths. There is a non-violent end to the robbery, and a process is set in motion to achieve substantive justice. There is thus a positive outcome, which must be considered in the assessment.

13. Much of the strong language is used in the scene depicting the take-over of the bank by the robbers. Strong language and threats are used to exert control. However, there is use of strong language throughout the film. This is a film about robbers, desperate to achieve their objective, and about police attempting, in a high pressure situation, to put an end to the hostage taking. The use of strong language in this context must be anticipated as part of the development of the plot. Despite the frequency of the strong language, it cannot, in general, be characterised as being of a demeaning nature.

14. Section 18(4)(a) of the Films and Publications Act 65 of 1996 (as amended) provides:

The classification committee shall examine a film referred to it in terms of subsection (2) and shall, with the reference to Schedules 6, 7, 8, read with Schedule 9 and 10, classify that film –

- (i)
- (ii)
- (iii) by imposing any restrictions in accordance with Schedule 8;

Schedule 8 of the deals with age restrictions for films and provides:

An age restriction may be imposed only if the classification committee or the Review Board is of the opinion that, judged within context, it is necessary to protect children in the relevant age group against harmful and disturbing material in the film.

15. The classification guidelines published by the Board guide and structure the discretion of both the Classification Committee and the Review Board.

In the appeal regarding the film *Hostage*, we stated:

In our previous awards, we have urged Classification Committees to start from the least restrictive classification and move progressively to more restrictive classifications. The more restrictive classification should only be adopted if a decision is made that the less restrictive ones are inappropriate. Classifiers are appointed from various segments of the South African community and bring with them their valuable life experiences. However, the decision to classify is not a subjective one based on life experiences alone. The decision must be made in terms of the Films and Publication Act¹, the guidelines promulgated in terms of the Act, and by reference to our experiences.

Further, in the appeal regarding the film *Fantastic Four* we stated:

The guidelines promulgated in terms of the Act inform and assist the exercise of the discretion as to what constitutes harmful and disturbing material. The guidelines identify classifiable elements such as the theme, language, use of drugs, prejudice, nudity, sex, and violence. All the elements, to the extent that they are relevant to the film, must be considered collectively before a decision is made.

16. It was common cause that this film would, in terms of our Act and guidelines, attract a restrictive age classification of either '13' or '16'. Implicit in the argument submitted on behalf of the Classification Committee was a concern for children of or around the age of 13. Had the flexibility existed, the classification committee might have opted for a restrictive classification of '14' or '15'. This film has attracted divergent

¹. Films and Publications Act 65 of 1996, as amended.

classifications in various countries: in Germany, for example, the film received a '12' classification, whereas in the UK it attracted a classification of '15'.

17. The relevant provisions of the guidelines that indicate that the film is not suitable for children under the age of 13 provides:

Language: There may be some strong language appropriate to plot and part of character development. There may be language including mild sexual humour that reflects anti-social values within context as part of plot and character development but not of a demeaning nature.

Violence: Scenes of realistic and intense violence should be brief and infrequent. Some realistic violence should be interrogated in a pro-social manner and shown as negative, hurtful, wrong and destructive. Violence based on prejudice should be mild and resolved in a way that supports human rights values. Violence should neither be glamorised nor presented as a way to solve conflicts.

18. The need to proceed from a less restrictive to a more restrictive classification is in order to meet our broader constitutional obligations of respecting the freedom of expression, and only limiting expression if such limitation is reasonable and justifiable in an open and democratic society.² Our constitutional obligations require us to proceed to a more restrictive classification only if we form the opinion that such classification is necessary to protect children against harmful or disturbing material in the film. If a less restrictive classification can achieve the objective of protecting children, then we are constitutionally obliged to accord the film the less restrictive classification.

². See section 16 read with section 26 of the Constitution of the Republic of SA, 1996.

19. We are of the opinion that, in terms of the guidelines, a restrictive age classification of '13' would be appropriate for this film. The infrequent scenes of violence would most appropriately fall with this category. There is implicit social commentary about the undesirability and futility of violence in the film. There is a strong message that it is not the way to solve conflicts. Further, for the reasons stated earlier, the scenes containing acts of violence are presented through techniques that reduce or mitigate the impact of the violence. We are of the view that the strong language used is, in most instances, appropriate to the plot and character development. Viewed holistically, we are of the view that the strong language does not justify the imposition of a more restrictive classification than '13'. We are of the opinion that a restrictive age classification of '13', together with consumer advisories for violence and language, would serve as a cautionary note to parents with children in this age group.

Conclusion:

1. The decision of the Classification Committee is set aside.
2. This film is assigned a restrictive age classification of '13' with consumer advisories for violence and language: 13 (V)(L)

Dated at Durban on the 4th April 2006

Concurred by:

Mr Dakalo Kwindu

Adv. Ronald Lessick

Mr Jack Phalane

Ms Rene Smith