TORTOLA, B.V.I.

IN THE COURT OF APPEAL

MAGISTERIAL APPEALS NO.1 of 1984

BETWEEN:

THE ACTING CHIEF OF POLICE - Appellant

and

DAVID NOLLY BRYAN - Respondent

NO. 2 of 1984

THE ACTING CHIEF OF POLICE - Appellant

and

ALPHONSO BRYAN - Respondent

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Williams (Acting)

Appearances: L. Hunte, Attorney General, with him H.D. Protih for the Appellant
J.S. Archibald, Q.C., with him G. Farara for the Respondents

1984: Jan. 15, 17,
1985: June 10.

JUDGMENT

ROBOTHAM C.J. delivered the Judgment of the Court.

The Respondent David Nolly Bryan was charged on a complaint of the Chief of Police for that he, on May 17, 1984, being a Captain on board a foreign fishing boat registration No. 9720T together with Alphonso Joseph Bryan, in the exclusive fishing zone of the Virgin Islands, did take marine productions (sic) to wit 515 lbs of fish without the authority of a licence issued by the Minister - contrary to section 7(1) of the Fisheries Ordinance No. 18 of 1979 as amended by Ordinance No. 3 of 1982.

A charge in similar terms was laid against the other respondent Alphonso Bryan. On June 12, 1984, the Magistrate dismissed the charges, hence this appeal by the Chief of Police. In dismissing the charges the Magistrate in his reasons stated as follows:-

/In my.....

> "In my final determination, I find firstly that the evidence for the Prosecution has not established beyond reasonable doubt that the boats were foreign fishing boats, as no evidence was led as to what series of registration numbers are used by local fishing boats neither was there any direct oral testimony that the boats were foreign."

The Magistrate took cognizance of the Reciprocal Fisheries Agreement Treaty series No. 32, (1983) made between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America dated London, March 27, 1979, with agreed minute of April 28, 1980, and in respect of which instruments of ratification were exchanged on March 10, 1983, He also took cognizance of the fact that this treaty (as it will hereinafter be called) was presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by command of Her Majesty in July 1983 as appears on the face thereof. Further, that this treaty was gazetted in the British Virgin Islands Gazette on May 16, 1984, the date immediately prior to the commission of the offence. He thereupon concluded that this treaty:-

> "being a treaty made by the Imperial Parliament took precedence over the local legislation of the British Virgin Islands namely the Fisheries Ordinance of the British Virgin Islands. The said agreement was gazetted in the British Virgin Islands on May 16, 1984. This Court in coming to its decision is of the view that the said agreement had to be construed in favour of the defendants and .....that the defendants were fishing within existing levels and patterns in accordance with the agreed minute of April 28, 1980."

Article III of the agreed minute reads as follows:-

> "Commercial fishing vessels of the United States may continue in the exclusive fishing zone of the British Virgin Islands in accordance with existing patterns and at existing levels. The Government of the United Kingdom of Great Britain and Northern Ireland extends access to the exclusive fishing zone of the British Virgin Islands to vessels of the United States for the purpose of conducting such fishing."

/Throughout....

Throughout the appeal, the words treaty, agreement and agreed minute were used interchangeably.

It is a matter of record and agreed on all sides that this treaty was never made into an Imperial Act of the United Kingdom, by way of Imperial legislation being passed, it was never extended to the British Virgin Islands by an Order in Council, made in the United Kingdom and it was never passed into law by the Parliament of the British Virgin Islands. It was merely gazetted.

The main grounds of the Honourable Attorney General's / appeal were (1) that the Magistrate misdirected himself in the construction and application of section 7(1) of the Fisheries Ordinance (No. 18 of 1979) and in so doing produced an unreasonable interpretation, (2) that he failed to draw the correct distinction between judicial notice, presumption, and reasonable inference and thus came to an erroneous conclusion as to whether the boats were foreign fishing boats, and (3) he misdirected himself with respect to the legal effect and interpretation of the treaty.

Grounds 1 and 2, can be dealt with together. I will deal with them in the first instance because the Honourable Attorney General before this Court conceded that failure to prove that the boats were foreign fishing vessels would be fatal to the Crown's case and the appeal.

At the beginning of his submissions, he preceded on the basis of a submission that there was sufficient evidence for the Magistrate to have called upon the accused for a defence. He asked finally that the matter be remitted to the Magistrate with directions for him to call on the respondents to answer the charges. He however when it was pointed out to him/readily conceded that the respondents had been dismissed by the Magistrate and a finding of not guilty recorded in their favour. That in such a case it was a final determination of the matter and it could not be sent back to him. The record reads:

/"Case for....

"Case for prosecution.
Case for defendants begin.
Learned Counsel states that there is
no case to answer in fact or in law.
We will not call any witness, neither
will the accused testify."

The lengthy submissions which followed were in fact final addresses by Counsel on both sides resulting eventually in a verdict of not guilty.

It is undisputable that no direct evidence was led to establish either that the boats were in fact foreign fishing boats, or that the markings VI 9726 T on one boat named the Pit-Bull-Gang was a foreign registration number. The Attorney General submitted that the Magistrate ought to have taken judicial notice of, The Fisheries Rules S.R.O. No.31 of 1982 published in the Gazette on October 21, 1982, and in particular of Rule 11 which provided that each commercial fishing boat registered in the British Virgin Islands must be given a number in the series 001 to 500 prefixed by the letters B.V.I. and of Rule 12 which provided that pleasure fishing boats should be numbered in the series 501-999 also prefixed by the letters B.V.I.

This order does not seem to have been produced at the trial but the Attorney General relied on section 22 of the Interpretation and General Clauses Act Cap. 135 which provides that all subsidiary legislation once gazetted shall be judicially noticed. Whilst this may be the true situation in the majority of cases, since no direct evidence was being led as to the foreign identity of the boats, it might have been better we think, if the Magistrates had been advised of the Crown's reliance on this order. The Attorney General contended before us that since the markings VI 9726T were not of the series called for under Rules 11 and 12 of S.R.O. 31 of 1982, then the only inference which could logically be drawn was that it was a foreign fishing boat. In short therefore the Crown was seeking to prove a vital element of its case by asking the Court to take judicial notice of the contents of a statutory instrument and to draw an inference therefrom that the

/boat.....

boat VI 9726T was a foreign fishing boat it not being in the series 001-500 or 501-999.

Under the Fisheries Ordinance "foreign fishing boat" means

> "a fishing boat owned and operated by a person not deemed to be a belonger, or a fishing boat owned and operated by a person not resident in the territory."

It will clearly be seen therefore that the Crown had to go further and prove more than the bare fact that the markings VI 9726T were not B.V.I. registration numbers, which it was being sought to do by way of inferences. As the matter stood, the further proof required that it was owned and operated by a non-belonger or a person not resident in the B.V.I. would have necessitated asking the Court to draw the inference from another inference, the argument running thus - if it can be inferred that the markings VI 9726T are not B.V.I. numbers, then it must follow that the boat is a foreign boat. If therefore the boat is a foreign boat it must also be inferred that it is owned and operated by a non-belonger or a person not resident in the territory.

The Magistrate obviously was not impressed with the absence of positive evidence on this. In dealing with the evidence of Randolph Walters the Marine Biologist, and Noel Vanterpool the Chief Agricultural Officer he had this to say:-

> "This witness (Walters) also testified amongst other things that he liaisoned with fishermen from neighbouring countries, yet neither he nor more importantly Noel Vanterpool gave any direct testimony as to the foreign identity of the boats in question especially as they had seen the markings on them. It was left to the Court to presume that they were foreign fishing boats taking into consideration S.R.O. No. 31/82. To this Court's mind this is a question of fact vital to the elements of section 7(1) of the Fisheries Ordinance 18/79 and in this connection I adopt the words of Lord Fraser of Tullybelton in the Privy Council case of Dillon v R 74 Cr. App. Rep. 274 where he said: It is well established

/that the.....

> that the Courts will not presume the existence of facts which are central to an offence."

In the final result he held that the evidence for the Prosecution had not established beyond reasonable doubt the essential ingredient that the boats were foreign fishing boats, as defined by the Ordinance. Whether or not the Crown had satisfactorily discharged the burden of proof was a matter on which the Magistrate had to be satisfied beyond reasonable doubt. If he was not, then he had no alternative but to have taken the course which he did. We are of the view that some direct evidence should and could have been led on the question of whether or not the boats in question were foreign fishing boats within the terms of the definition. To have sought to prove this essential ingredient by asking the Court to take judicial notice of a statutory instrument and to draw inferences, was not a satisfactory state of affairs and we cannot say we are in disagreement with the Magistrate. On this point therefore, if on no other, the appeal of the Chief of Police must be dismissed.

Whilst this is sufficient to dispose of the appeal in favour of the respondents, we think we should not leave the matter without briefly expressing an opinion on the legal effect of the treaty vis-a-vis the British Virgin Islands Fisheries Ordinance No. 18/1979 as amended by No.3/1982.

In effect the finding of the Magistrate was that the Fisheries Ordinance of the British Virgin Islands was national legislation which had to give way to the treaty which was Imperial legislation made by the Imperial Government and as such was binding on the Colonies. Any national legislation therefore which attempted to limit or control the continuance of commercial fishing by vessels of the United States in the exclusive fishing zone of the British Virgin Islands in accordance with existing patterns and existing levels as provided for in Article III of the treaty would be repugnant to the treaty and to that extent would be null and void. This view was

/the one....

the one advanced by counsel for the respondents both before the Magistrate, and before this Court. It was the Attorney General's contention that the Magistrate misdirected himself on the legal effect and interpretation of the treaty.

He submitted that the treaty could not be called an Imperial Act or Imperial legislation and as such binding on the British Virgin Islands, because although on the face of it it was presented to Parliament by the Secretary of State in July 1983, it was not passed into law by the Parliament of the United Kingdom. Furthermore, it was never given the force of law in the British Virgin Islands as no legislation was passed in respect thereof. Instead, it was merely gazetted. He referred us to Wade and Phillips Constitutional Law (6th edition) page 259 on the constitutional requirements of a treaty:-

> "At first sight treaty making power appears to conflict with the Constitutional principle that the Queen by prerogative cannot alter the law of the land, but the provisions of a treaty duly ratified do not by virtue of the treaty alone have the force of law. The assent of Parliament must be obtained and the necessary legislation passed before a Court of law can enforce the treaty, should it conflict with the existing law."

He went further and submitted that not only was there nothing to show that the treaty formed part of United Kingdom legislation but there also was nothing otherwise to show that it had been extended to the Colony by an Order in Counsel and merely gazetting it locally did not give it the force of law. It therefore remained nothing more than an agreement between two nations, and did not have the force of law in the British Virgin Islands.

He further referred the Court to the case of R v Chief Immigration Officer,Heathrow Airport and another Ex parte Salamat Bibi 1976 - 3 All E.R. 843. This was a case where an order of certiorari was being sought to allow a citizen of Pakistan to enter the United Kingdom as of

/right...

right in accordance with Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. The head note reads in part:-

> "Treaties and conventions were not to be treated as part of the law until their provisions were given effect by an Act of Parliament. The convention was not therefore a part of the law of the United Kingdom and Article 8(1) gave the applicant no right of entry."

Lord Denning M.R. said at page 845 para g: "....but I would dispute altogether that the convention is a part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament."

Roskill L.J. was of the same view, and Geoffrey Lane L.J. (as he then was) said at page 850 para g - j:- "It is perfectly true that that convention was ratified by this country. It is true that in 1966 and thereafter Her Majesty's Government had declared that Article 25 is available to the citizens of this country and of which they may take advantage. Nevertheless the convention not having been enacted by Parliament as an Act does not have the effect of law in this country; whatever persuasive force it may have in resolving ambiguities, it certainly cannot have the effect of overriding the plain provisions of the 1971 Act (The Immigration Act) and the rules made thereunder. That is what counsel for the appellant indeed is suggesting....."

What Geoffrey Lane (now C.J. of England) rejected then, is indeed what Mr. Archibald for the respondent is asking this Court to accept now. Without going any further into the detailed submissions made on both sides, it is quite clear that Mr. Archibald's submissions that the Reciprocal Fisheries Agreement 32/1983 overrides the Fisheries Ordinance 3/1982 of the British Virgin Islands and the rules made thereunder, cannot be accepted.

/The treaty....

The treaty in this case in a reciprocal agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the United States Government, the purpose of which as stated in the preamble, was "to maintain the long standing and co-operative fisheries relations in adjacent waters which have formed a part of the close ties between the people of the British Virgin Islands and the people of the United States."

In keeping with this aim, Articles II allowed commercial fishing by vessels of the British Virgin Islands to continue in the exclusive fishing zone of the United States in accordance with existing patterns and at existing levels. Article III gave a reciprocal right to the United States vessels in the exclusive fishing zone of the British Virgin Islands. The existing patterns and levels are set out at the back of the treaty under the heading "Agreed Minute". The effect of this treaty in our view was to preserve the rights which existed but it does not have the force of law. It does not restrict in any way the right of the British Virgin Islands legislature to say in what manner these rights should be exercised within their waters. Indeed Article IV states:

> "The Government of the United Kingdom of Great Britain and Northern Ireland shall have exclusive authority to enforce the provisions of this agreement and applicable national fishery regulations with respect to fishing by vessels of the United States in the exclusive fishery zone of the British Virgin Islands; provided that such national regulations as may be applied shall not disturb existing patterns and levels of fishing."

We are unable therefore to hold that the Fisheries Ordinance 1979, No. 18 of 1979 as amended by the Fisheries (Amendment) Ordinance 1982, No.3 of 1982 is invalid, null and void. Whilst recognizing the existence of the treaty or the agreement, we are firmly of the view that it was legally right and proper for proceedings to have been

/instituted.....

instituted under the Fisheries Ordinance against these respondents. The Crown failed because it did not establish to the satisfaction of the Magistrate an essential ingredient of the offence. The appeal is therefore dismissed and the decision of the Magistrate affirmed, insofar as the dismissal of the respondents on the charges go. We place on record, to remove all doubt, that the Crown does not have the right to proceed against them a second time in respect of these offences, despite our upholding the validity of the Fisheries Ordinance.

Whilst this finally disposes of the appeal, I came across in my researches an opinion given in 1863 by the Law officers of the Crown to His Grace the Duke of Newcastle, K.G., that is of such interest that I feel impelled to refer to it. It appears in Chapter 17 dealing with Trade and Treaty Relations of the Colonies, in a publication entitled Opinions on Imperial Constitutional Law by D.P. O'Connell and Ann Riordan (1971). The chapter starts thus at page 368:

> "The problem of Imperial responsibility for the performance of treaty obligations in matters in which Colonial Governments were responsible arose on several occasions in the nineteenth century. The Imperial Parliament of course, had pre-eminent authority to legislate for observance of treaties in the Colonies, but the reluctance of the British Government to override Colonial authorities was evident from an early stage. Eventually the solution reached was territorial application to Colonies only after they signified their assent to be affected by the treaties and undertook to enact the appropriate legislature....

The question asked of the Law officers by the Duke is recorded on the same page as follows:-

> "Temple January 6, 1863
>
> "That by a treaty between Great Britain and the United States of America dated October 20th 1818 (Hertslel ii p392) it was provided inter alia that the inhabitants of the United States should forever have the liberty to take fish on the coasts of Newfoundland in common with the subjects of Her Britannic Majesty."

/That this.....

> That this privilege was extended to the coasts of Canada (etc.) and Acts were passed by the different Colonies (named) to give effect to this treaty and especially to suspend the laws of the different Colonies which were inconsistent with the terms or spirit of the treaty.
>
> Information is sought whether inhabitants of the United States fishing in waters within the jurisdiction of the legislature of Newfoundland or any of the above named Colonies are bound to obey and are legally punishable for disregarding the laws or regulations enacted by or under authority of the respective provincial legislatures for the conduct of fisheries....."

The reply was:-

"In our opinion inhabitants of the United States fishing in waters within the territorial jurisdiction of the legislature of Newfoundland or any of the above mentioned Colonies, are bound to obey, and are legally punishable for disregarding the laws and regulations for the conduct of fisheries enacted by or under authority of the respective legislatures. The plain object of the treaties.... was to put the inhabitants of the United States as regards the "liberty to take fish" within the parts described of the British Dominions, on the same footing as subjects of Her Britannic Majesty "IN COMMON" with whom in the terms of the treaties such liberty was to be enjoyed.

The enactments subsequently passed did but confirm the treaties and provide for the suspension during the operation of those treaties of such laws as were or would be inconsistent with the "terms of the spirit" of the treaties which "terms and spirit" are, it appears to us, in no respect violated by regulations bona fide made for the Government of those engaged in the fishing and applicable to all British subjects so employed....."

The problems in fishing are not so new after all.

/.....

L.L. ROBOTHAM,
Chief Justice

I agree.

E.H.A. BISHOP,
Justice of Appeal

I also agree.

L. WILLIAMS
Justice of Appeal (Acting)

Court could not be said to be unjustified or without reason.

Mr. Simon also referred to the sections of the Code which were relied upon by Mr. Jessamy, pointing out that the strike and the lock out were legitimate aspects of the process of free collective bargaining, and that except in strict conformity with the provisions dealing with Industrial Action, no court shall have jurisdiction with respect to the granting of any restraining order or any injunction, temporary or permanent, in connection therewith. It was the contention of Counsel that the limitations present in the law (section K 20) gave adequate protection to the employer. Mr. Simon referred to Part III of the Industrial Court Act 1976 which deals with "Lock-outs and Strikes" and indicated that protection was also provided when the matter was pending before this Court (section 20 (1)); and when the national interest was threatened or affected, in the opinion of the Minister of Labour, he had power to seek an injunction restraining the parties from commencing or from continuing a strike or a lock-out (section 21 (15)). Then there was the further provision - in the Code - which empowered the Minister to designate the essential services in Antigua and Barbuda. The list of essential services could be amended, by the Minister, at any time, and a service whose interruption would be likely to jeopardise, among other things, the economy of the State could be added. There were 9 essential services listed under the law but airline services were not among them. Mr. Simon stressed that the Government of Antigua, a shareholder in LIAT (1974) Limited, had not seen fit to have the service declared or listed as essential; and so it could be readily and reasonably inferred that the economy of the State would not be jeopardised.

I have looked at the clause proposed by the employer and rejected in its entirety by the employees. I have analysed the evidence and considered the submissions and arguments of learned Counsel. Again I find those of Counsel for the respondent cogent and preferable. I am satisfied that they have effectively answered the points raised on behalf of the appellant. I share the views expressed in the judgment, especially that the statutory provisions pertinent to the issue provide adequate and sufficient protection to the Company; and I can find no reason for the inclusion of a No Strike No Lock Out clause in the new Agreement to be signed. Indeed it

/was...

was, in my view, significant that the service provided by the shareholder, that Counsel would wish this Court to give it.

For all these reasons, I was convinced that the appeal ought to be dismissed.

Before leaving this matter I wish to observe that I anticipate that a degree of responsibility, at least as high as has already been demonstrated, will be exhibited by the parties. Counsel for the respondent while not giving an assurance, for the future, has emphasised that on the aspects under consideration the employees have always co-operated with their employer in order to ensure efficiency in maintenance of the aircraft; and I feel justified in assuming that their co-operation will continue, bearing in mind the significance of the role played by the Company. It would be folly for the engineers so to act that closure of the airline resulted. Wisdom and good guidance seemed to have been among the hallmarks of the previous relationship of the parties and I would anticipate that these qualities will continue to be demonstrated by both sides so as to bring credit to those directly involved, and to the communities served by an important regional airline.

E.H.A. BISHOP,
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice

G.C.R. MOE,
Justice of Appeal.