

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 5 of 1985

BETWEEN:

ARTHUR WILLIAMS - Appellant

and

THE QUEEN - Respondent

Before: The Honourable Mr. Justice Bishop - Chief Justice
 The Honourable Mr. Justice Moe (Acting)
 The Honourable Mr. Justice Mitchell (Acting)

Appearances: Mr. H. Tannis and Mr. S. John for the Appellant
 Mr. K. Hudson-Phillips, Q.C., and the D.P.P. for
 the Crown.

1986: July 15,
 Dec. 8.

JUDGMENTMOE, J.A., delivered the Judgment of the Court:

The appellant was jointly charged with one Raymond
 Knights with four offences, namely:

- (1) Receiving money being part proceeds of a
 cheque knowing the cheque to have been
 obtained by false pretence; contrary to
 section 210(1) of the Indictable Offences
 Act, Cap. 24.
- (2) Procuring a valuable security to be delivered
 by false pretence; contrary to section 169
 of the Indictable Offences Act, Cap. 24.
- (3) Conspiracy to defraud contrary to section 38
 of the Indictable Offences Act, Cap. 24.
- (4) Misbehaviour in public office contrary to the
 Common-Law.

At the close of the prosecution's case, after no-case
 submissions on behalf of both the appellant and Raymond
 Knights, the learned trial Judge directed the jury to return
 verdicts of not guilty on all counts in respect of Raymond
 Knights and on counts two and three in respect of the
 appellant. The jury eventually found the appellant not
 guilty of count one but he was convicted of the offence of
 Misbehaviour in public office and fined \$100,000.00 to be
 /paid.....

paid in 14 days or in default to serve one year imprisonment with hard labour. He appeals against both conviction and sentence.

In the indictment the particulars of offence given were that the appellant between 14th July 1983 and 25th July 1984 being and performing the duties of a Minister of the Crown by right of its Government of the State of St. Vincent and the Grenadines, to wit, Minister of Communications and Works with the intention of gaining improper personal pecuniary advantage fraudulently and improperly retained the sum of \$40,000.00 E.C. being proceeds of a cheque G.No.83683 issued by the said Government of St. Vincent and the Grenadines for payment of freight on 2,000 drums of asphalt shipped from Trinidad to St. Vincent on the M.V. Richard owned by the said Arthur Williams while being aware that freight in the sum of \$30,000 TT currency had already been paid for the said freight to Messrs Triumph Shipping Service of Trinidad and Tobago for and on account of the said Arthur Williams and credited to the use and account of the said Arthur Williams which he would not otherwise have done.

The prosecution adduced evidence that at the material time the appellant was a Minister in the Government of Saint Vincent and the Grenadines holding the portfolio of Minister of Communications and Works. He was also at the relevant dates owner of a vessel named the M.V. Richard and a firm Triumph Shipping Service in Trinidad was agent for that ship. On or about 3rd July 1983 Lake Asphalt a firm in Trinidad & Tobago shipped from Trinidad to St. Vincent by the M.V. Richard 2000 drums of asphalt bitumen consigned to the Ministry of Communications & Works, St. Vincent. Lake Asphalt paid to Triumph Shipping Service, the agent for M.V. Richard \$30,000 freight on that shipment. The office manager of Triumph Shipping Service, Victoria Kissoon, phoned the appellant and told him about the payment of the freight. About three days later she saw him at the office of the shipping service and discussed with him the payment of the freight. By August, 1983, Victoria Kissoon sent to the appellant a statement of account dated 28th July, 1983 relating to the M.V. Richard which showed a credit to the account of \$30,000 in respect of Lake Asphalt-freight, a balance due to owner of \$26,166.68 transferred to the account of M.V. Little Stephen, a ship also owned by the appellant and for which Triumph Shipping /Service....

Service was also agent in Trinidad. One of the documents sent with the statement of account was a copy of the bill of lading in relation to the shipment on which was stamped Freight prepaid, \$30,000 T & T and date stamped 5th July, 1984. Out of the balance of \$26,166.68 in August 1983 Kiscoon, on the appellant's instructions, by Telex, transferred \$5,000 to the appellant's personal account in the Bank of Nova Scotia. She also sent him a statement of account dated 11th August, 1983 relating to the M.V. Stephen showing the credit of \$26,168.68 amount due owner M.V. Richard and the debit in relation to the Telex transfer. The appellant never queried either account. Also put in evidence were (a) immigration cards which showed that the appellant left St. Vincent on 9th July, 1983 and returned on the same day; (b) the appellant's passport which showed he entered Trinidad on that day.

There was also evidence that on 14th July, 1983 the appellant presented to the General Manager of the Government Funding Scheme a bill for the freight cost of Bitumen which Government had received. He was handed a payment voucher in the name of Raymond Knights the agent for the M.V. Richard in St. Vincent. On the same day the appellant presented the payment voucher to the Treasury and was handed a cheque drawn in favour of Raymond Knights in the sum of \$40,000. On the same day the appellant deposited the proceeds of that cheque into his account at the Bank of Nova Scotia. In evidence also was a deposit to the appellant's account at the said Bank on 5th August, 1983 \$4,995.00; \$5.00 stamp charges having been deducted from a Telex transfer of \$5,000.

The appellant gave evidence that he agreed to bring 2000 drums of asphalt at \$20.00 per ton from Trinidad to St. Vincent on terms that freight and landing charges were to be paid in St. Vincent. The asphalt was brought by the M.V. Richard and the Ministry of Communications, Works and Labour took delivery. Some time after delivery the agent Mr. Knights made a bill for the freight which was handed to Mr. Jermay of the Funding Scheme. A payment voucher was brought to him which he got Mr. Knights to sign. He then took it to the Treasury where a cheque was prepared in Knight's name for \$40,000 being freight and landing charges. After he got the cheque Knights signed it and he paid it into his account. He said Triumph Shipping Service acted as agent for the voyage of the M.V. Richard concerned. He said that after the ship was loaded on the 1st /July.....

July, 1983 he had no conversation with Victoria Kissoon. He denied being told by her that freight had been paid by Trinidad Lake Asphalt. He said that he saw the disbursement for the Little Stephen and M.V. Richard for the first time on 12th March, 1985, i.e., the day on which Kissoon gave evidence at the preliminary enquiry that she had paid him some money in Trinidad by a cheque somewhere between 9th and 10th July, 1983 and the balance of the money she put to the other ship's account. It was on that date 12th March, 1985 when he saw the original bill of lading put in by a witness that he first knew that freight was paid twice. He had not queried any of the accounts coming from Triumph Shipping Service because he did not have opportunity to do so. He termed the account dated 28th July, 1983 in relation to the M.V. Richard a bogus account. He maintained he did not know that freight in the sum of \$30,000 T.T. was paid on 5th July 1983 and that he retained the \$40,000 as due and owing to him on a contract of affreightment.

Twelve grounds of appeal against conviction were presented but were argued under four main heads.

The first ground of complaint dealt with was that the learned trial Judge was wrong in law in not withdrawing the case from the jury after a no-case submission.

It was submitted first that the evidence did not establish an essential element in the alleged offence, namely, that the appellant was a public officer. In other words, in light of the charge, that the appellant was a person in public office. Counsel for the appellant referred to sections 105(1), 78 51(4), 63(2) and 101 of the Constitution of Saint Vincent and the Grenadines. Section 105(1) provides "In this Consistution, unless the context otherwise requires -

" "public officer" means a person holding
or acting in any public office;

"public office" means any office of
emoluments in the public service;

"the public service" means, subject to
the provisions of this section, the
service in civil capacity of the Government."

Section 78 deals with the power of appointment, disciplinary control and dismissal of public officers; section

/51(4).....

51(4) sets out the manner in which appointments to the office of Minister are made. Section 63(2) states that the office of the Attorney-General shall be either a public office or the office of a Minister and section 101 makes the Constitution the Supreme law of Saint Vincent. Counsel for the Crown pointed to *Walter v R.* 27 W.L.R. 386 in which he submitted this Court had interpreted Constitutional provisions in *pari materia*.

Definitions such as set out in section 105(1) are found in the Constitutions of all Commonwealth Caribbean countries. It must be observed also that section 105(2) of the Constitution as does a similar sub-section in other Constitutions, removes the office of Minister from the ambit of the definitions set out in section 105(1). For section 105(2) provides "In this Constitution reference to an office in the public service shall not be construed as including - (A) references to....., the Prime Minister or any other Minister....." The effect of such provisions was considered and ruled on in *Walters v R* (*supra*) where this Court reviewed the provisions contained in the Antigua Constitution Order 1967 and held that the Premier of Antigua and Barbuda was a person in public office. We agree with that ruling. Sections 78, 51(4), 63(2) and 101 do not assist us in this matter.

We would add that in our view the meaning ascribed to public officer at Common Law as enunciated in *Rex v Whittaker* (1914) 3 K.B. 1283 i.e. "a person who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund by the public" - is not inconsistent with the meaning of the term set out in section 105(1). Consequently to apply the Common Law and hold a Minister of Government to be a person in public office would ~~not~~ be applying a provision inconsistent with the Constitution and reference to section 101 thereof is unnecessary.

We hold that in this case, the appellant, at the material time being a Minister of Government, was a person in public office. This submission fails.

The second contention was that where there is a statutory provision dealing with an offence, the Common Law cannot apply. Counsel submitted that by section 26(1)(h) and (5) of the Constitution and sections 35 and 36 of the Representation of the Peoples' Act No. 7 of 1982 Parliament /clearly.....

clearly laid down the penalty to be applied when a person had a contract with Government. That this case concerned a contract between a Minister and Government which fell within the statutory provisions and so the Common Law was excluded. He relied on *R.V. Hall* (1891) 707. In so far as may be relevant, section 26 of the Constitution provides "(1) No person shall be qualified to be elected or appointed as a Representative or Senator.....if he (h) subject to such qualification and limitations as may be prescribed by parliament has any such interest in any such Government contract as may be prescribed.

(5) In subsection (1) of this section - "Government Contract" means any contract made with the Government or with a department of the Government or with an officer of the Government contracting as such."

In the Representation of the Peoples' Act (Supra) a provision in terms identical to section 26(1)(h) is re-enacted as section 34(1)(h) and in subsection (2) thereof it is provided "the provision relating to disqualification referred to in section 26 of the Constitution shall be as set out in section 35 of this Act." Section 35(1) provides "subject to the provisions of this section, no person shall be qualified to be a Member of the House of Assembly if he, or any firm in which he is a partner or any body corporate, which he controls is a party to any contract made with Government of the State or a department of that Government or an officer of that Government contracting as such for the sale of goods, or the rendering of services by that person or by that firm or body corporate." Subsection (3) states "A person shall not be disqualified to be elected or appointed as a member of the House of Assembly by reason of such a contract as is referred to in sub-section (1), if, within one month before the date of the election or appointment, as the case may be, he publishes in the official Gazette of the State and in a local newspaper a notice setting out the nature of that contract and his interest therein."

Section 36 then provides;- "The seat of a member of the House of Assembly shall become vacant if any circumstances arise, that, if he were not a member of the House of Assembly would cause him, subject to sub-section (3) of section 35, to be disqualified for election or appointment thereto by virtue of that section:

/Provided...

Provided that, if in the circumstances it appears to the House of Assembly to be just so to do, the House may exempt any member from vacating his seat under the provisions of this section, if such member, before making any such contract as is referred to in sub-section (1) of the said section 35, or before or as soon as practicable after otherwise becoming a party to it, or otherwise interested in it (whether through a firm in which he is a partner or through a body corporate which he controls) discloses to the House the nature of each contract and his interest thereon."

It will be observed that the statutory provisions to which learned Counsel referred do not make it a criminal offence for a Government Minister (or anyone else) to have a contract with the Government and consequently those provisions do not purport to deal with an offence. Therefore it cannot be said that those provisions have laid down alternative penalties for something that amounts to a criminal offence at Common Law. Further as Counsel for the Crown correctly pointed out *R v Hall* (supra) does not support the contention of the appellant. In that case an overseer of the poor for a certain parish in the County of London was charged on indictment with misconduct. The conduct impugned was not indictable at Common Law but was made an offence by a certain statute. On a motion to quash the indictment it was held that on a true construction of the statute creating the offence and prescribing a penalty, the remedy by indictment was excluded. This second submission also fails.

It was next submitted that no fraud nor anything improper had been established. Counsel contended that the evidence went to show the existence of a contract between the appellant and the Government, that the contract was discharged and therefore in these circumstances the appellant would have been entitled to payment by the Government of St. Vincent and the Grenadines. Further the fact that the bill of lading, a document drawn up after the contract, has freight prepaid on it does not prove anything. Counsel for the Crown submitted that the mere existence of a contract between parties does not prevent the commission of an offence by act or acts in conformity with that contract or in execution of the same. He submitted that there was evidence of an oblique motive on the part of the appellant particularly in terms of his
/obligations.....

obligations under the Representation of the Peoples' Act (supra) as the Minister responsible for the administration of the very department which contracted for the delivery of the asphalt by the appellant's ship - the motive being, the appellant intended to gain personal pecuniary advantage ~~fraudulently~~ ^{fraudulently} and improperly. We accept the respondent's submission. It is clear that the appellant's submission ignores that the charge was that having been paid freight twice and being so aware, he fraudulently and improperly retained the second payment.

The fourth contention under this head was that the evidence of the witness Victoria Kissoon was completely inconsistent and unreliable and the Judge ought to have withdrawn the case since her evidence was the basis for much of the prosecution's case. He referred us to R v Galbraith 73 Cr App R. 124. He drew our attention to three passages in the witness's evidence. One passage indicated that the witness under cross-examination could not give the exact date of the month, or day of the week on which she saw the appellant in Trinidad at her office as she said sh did in examination-in-

chief. In another passage she had said she saw him at her office at Triumph Shipping Service 4-5 days after seeing the bill of lading and receipt for payment of the freight. Thirdly the following was pointed to as affecting the consistency and reliability of the witness's evidence; "I did not give accused Williams a cheque on the time I saw him at Triumph Shipping Service." Deposition page 8, line 14..... "A few days later.....the balance was paid to him." I said so. That's what I gave in evidence. The answer is yes that the balance was paid to him.

We do not find that anything drawn to our attention was so inconsistent or such as to make her evidence totally unreliable. Indeed whether there were such inconsistencies or not was a matter for the Jury's determination.

In R v Galbraith (supra) Lord Chief Justice Lane stated the following guidelines as to how a judge should approach a no-case submission.-

- "(1) If there is no evidence that the crime alleged has been committed by the defendant, the case should be stopped.
- / (2) If.....

- (2) If there is some evidence but it is a tenuous character, i.e. because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

Lord Lane also pointed out there will always be borderline cases which can safely be left to the discretion of the judge.

At the close of the prosecution's evidence, the case depended much on the view to be taken of Victoria Kissoon's evidence. The view to be taken was a matter for the jury. If her evidence was accepted there was evidence on which the jury could have concluded that on or about the 8th July 1983 the appellant was aware that freight cost on the shipment concerned in the sum of \$30,000 T.T. had been paid to his agent in Trinidad & Tobago. Further that by some time in August 1983 the appellant was aware that as owner of the M.V. Richard he was credited with the said amount of \$30,000 T.T. (certain payments out of the said amount having been made on his behalf). There was also the evidence that on the 14th July 1983 the appellant negotiated payment by the Government of St. Vincent and the Grenadines of freight cost on the said shipment in the sum of \$40,000 which he deposited to his bank account. From that date until the 25th July 1984 he was a Minister of Government. Up to the date he ceased to be a Minister the appellant had not repaid the \$40,000 or any part thereof. It was therefore open to the jury to decide that (1) the appellant improperly retained the \$40,000.00 between the dates concerned and (2) that from all the circumstances by so doing he intended to gain an improper pecuniary advantage. In the circumstances the learned trial Judge quite properly ruled that there was a case to answer.

This appeal fails under this first head.

/We.....

We turn to the ground that the verdict of the Jury is inconsistent. It was submitted that the Jury having found the appellant not guilty on Count one must have been under extreme difficulty in accepting the evidence of the witness Victoria Kissoon. In that event the evidence would hardly be acceptable under Count four. We do not accept the submission that an acquittal necessarily means there was difficulty in accepting a witness's evidence.

The particulars of offence given under Count one were that:

"Arthur Williams and Raymond Knights on the 14th day of July, 1983 at Kingstown in Saint Vincent and the Grenadines did receive from the Government of Saint Vincent and the Grenadines the sum of \$33,000 East Caribbean currency the property of the Government of Saint Vincent and the Grenadines being part proceeds of a cheque in the sum of \$40,000 East Caribbean currency knowing the said cheque to have been obtained by false pretence, namely, on the false representation to the Government of Saint Vincent and the Grenadines by Arthur Williams and Raymond Knights that the Government of Saint Vincent and the Grenadines was indebted to Arthur Williams owner of the Motor Vessel "Richard" in the sum of \$40,000 East Caribbean currency being freight charges for transporting 2,000 drums of Asphalt Bitumen in the Motor Vessel "Richard" from Trinidad and Tobago to Saint Vincent and the Grenadines knowing the freight of \$30,000 Trinidad and Tobago currency had already been paid to Triumph Shipping Services in Trinidad and Tobago, Agent for the Motor Vessel "Richard".

We are of the view that the acquittal on Count 1 is not inconsistent with the conviction on Count 4 particulars of which were set out at the commencement of this Judgment. In the first place the two offences concerned involve different ingredients. The prosecution therefore had to satisfy the jury differently. It seems to us sufficient to point out that as regards Count 1 the Jury may not have felt sure that they could find that there was a false representation on 14th July 1983; or in other words that all the ingredients of that count had been established, whereas the question of false representation was not involved in Count 4. We find no merit in this ground.

We turn now to the complaint that the verdict under all the circumstances is unsafe and unsatisfactory. Under this head Counsel for the appellant criticised the directions of
/the learned...

~~the learned Judge to the Jury in seven respects.~~ All the directions referred to under this head were directions on the evidence. In some instances the learned Judge reminded the Jury of the case for the prosecution and in others the appellant's case. In one instance she suggested to the Jury how they may interpret a document which was in evidence. We do not consider it necessary to detail all the directions for we find that in all the instances referred to, the learned Judge properly left it for the Jury to determine what inferences they drew from the evidence and to reach their own conclusions on the evidence. However in one passage the learned trial Judge, (in dealing with Victoria Kissoon's evidence that she transferred \$5000 by Telex to the appellant as he had instructed her to do,) said "however, the accused did admit that he asked for that \$5,000 but he is saying it could not have come from that \$30,000 because he had money there in which she could have remitted the \$5,000 to him." Counsel for the Crown agreed this was a wrong statement of fact when the learned Judge was marshalling the case for the prosecution and the case for the defence. But later in the summation the learned Judge carefully and in detail went through the evidence of the appellant. The learned Judge reminded them - "Then he was shown this Telex transfer on the 2nd August, 1983, in the sum of \$5,000 E.C. This is the same Telex transfer that I have been telling you about all this time and he said that it was in respect of monthly wages for the nine sailors on the "Little Stephen"....." Later in dealing with the appellant's evidence that he arranged with Victoria Kissoon to transfer two cheques to him in St. Vincent, the learned Judge further told the Jury, "He said "we did not discuss the \$5,000.00 she sent for his seamen and that he phoned her about the cheques"....." We are of the view that any misunderstanding which might have arisen from the wrong statement of fact would have been cleared up by the subsequent careful and detailed consideration of the appellant's evidence where the evidence on the matter was correctly stated. We find nothing in the directions referred to under this head which could have prejudiced a fair trial of the appellant or led to confusion in the minds of the Jury.

Argued as a separate ground of complaint was that the learned trial Judge misdirected the Jury on the elements that must exist for a jury to be able to convict on the charge of /misbehaviour.....

misbehaviour in public office. Counsel complained of eight passages in the learned Judge's directions contained in the portion of the summation dealing with the elements of the offence. The main thrust of Counsel's submission was that the directions suggested to the jury that in the act complained of the appellant was acting in his Ministerial capacity, that is, used his Ministerial office to improperly retain the money concerned; whereas Counsel contended there was no evidence that what the appellant did, he did in his capacity as a Minister; that the evidence is that whatever the appellant did, he did in his capacity as a private individual, a ship-owner. An analysis of the learned Judge's summation shows that the Jury were directed:-

- (1) There must be some element of dishonesty;
- (2) that the appellant is a public officer;
- (3) the question is whether - when the appellant retained the proceeds of the cheque for \$40,000 he retained them as a secret profit and whether that was wicked, corrupt or dishonest;
- (4) they were to decide whether the appellant was tempted to do what he did by the prospect of gain, that he profited by his own dereliction of duty and to accomplish his purpose, it was necessary to conceal the actual transaction;
- (5) they were to see whether there was any conflict of interest;
- (6) there must also be a breach of trust;
- (7) they were to look to see if there was a fraud in a matter concerning the public;
- (8) they were to see whether there was a misuse of the power entrusted to the appellant for the public benefit for the furtherance of personal ends;
- (9) the element of culpability required has to be such that the conduct was calculated to injure the public interest and calls for condemnation and punishment;
- (10) if it is proved that there was an intention of gaining improper personal pecuniary advantage and without proper regard to the interest of the Government or the people, which the appellant would not otherwise have done, that would constitute the offence.

/The effect.....

The effect of the summation was that the Jury were to find all those things in order to convict of the offence in Count four. The learned Judge commenced at page 281 of the Record to deal with the elements involved in that offence and having given directions as just summarised ended at page 291 by saying "so Mr. Foreman and Members of the Jury this is as much as I can tell you on the offence of misbehaviour in office, these are the elements the prosecution must have proved to you and on the evidence you must come to your own conclusions."

Counsel for the Crown submitted that the directions of the learned trial Judge were favourable to the appellant in that they required the Crown to prove more than was necessary on the facts of the case. He submitted that in this case one had to look to see whether the following were present:-

- (a) That the appellant was a public officer;
- (b) that as such he owed a duty;
- (c) whether there was a breach of that duty;
- (d) whether the conduct impugned was calculated to injure the public interest so as to call for condemnation and punishment;
- (e) whether there was an oblique or fraudulent motive.

The offence of Misbehaviour in public office may be committed in a variety of ways and in view of the way the prosecution alleged it was committed in this case we accept that the Jury were required to find whether the elements set out by Counsel for the Crown were present and the Jury were to be directed accordingly. However the Jury having been directed that they must find the various things (as outlined above) in order to convict for the offence must be taken to have found that those things were established.

The question arises, on what basis did the jury find those elements in respect of which the prosecution did not present a case or which did not form part of the prosecution's case? The Court at the hearing of the appeal raised the question whether the directions given may not have led to confusion. Counsel for the Crown responded that if there was confusion there would have been a disagreement or an acquittal. We do not feel that we can say that the jury must have ignored the Judge's directions, put aside the elements not required to be established and found as established only those necessary for
/the instant.....

the instant case. It seems to us that there must have been some confusion in the Jury's mind or faulty deliberation on their part in arriving at their verdict. It is trite Law that in a trial the Judge should relate the Law to the facts of the particular case. Excess of direction in Law may confuse a Jury as we think must have happened in this case. In the circumstances we would hold that the directions of the learned trial Judge amounted to Misdirection.

We however considered whether this was a case in which the proviso to section 39(1) of the West Indies Associated States Supreme Court (St. Vincent) Act, No. 8 of 1970 may be applied. We therefore looked to see whether the Jury would inevitably have come to the same verdict if they had been properly directed. We accept that on the basis that the Jury followed the trial Judge's directions and found all the elements "on which they were directed they must have found those elements" which were only necessary for this particular offence of Misbehaviour in public office. We are also satisfied that on the whole of the facts and with a correct direction the Jury would have returned the same verdict of guilty. Accordingly we consider that no miscarriage of justice has actually occurred through the misdirection. In the circumstances and for all the above reasons the appeal is dismissed. Conviction and sentence are affirmed.

G.C.R. MOE,
Justice of Appeal

E.H.A. BISHOP,
Justice of Appeal

H.L. MITCHELL,
Justice of Appeal (Acting)