SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL NO.46 OF 2005

BETWEEN:

ELWARDO LYNCH

Appellant

and

COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. Michael Gordon, Q.C.	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal

Appearances:

Dr. Linton Lewis, Dr. Godwin Friday and Mr. Brereton Horner for the Appellant
The Director of Public Prosecutions (Ag.), Mr. Colin Williams, for the Respondents

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2005: October 13; 14;
2006: March 20.

JUDGMENT

[1] BARROW, J.A.: The appellant was convicted on two counts of publication of false news likely to alarm the public, contrary to section 64 (1) of the Criminal Code.[1] That section provides:

> "(1) Any person who publishes any false statement, rumour or report which is likely to cause fear or alarm or to disturb the public peace is guilty of an offence and liable to imprisonment for one year.
> "(2) It shall be a defence to a charge under subsection (1) if the accused person proves that, prior to the publication, he took such measures to

[1] Chapter 124 of the Laws of Saint Vincent and the Grenadines, Revised Edition, 1990.

verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true."

[2] The statements that the appellant published in the course of a political meeting on 4th March 2005, that was broadcast by a local radio station, were as follows:

1. Tapping of telephones in St. Vincent is a reality. It is here ladies and gentlemen; it is here in the form of G-580 in Guardsman Yard where the Methodist Minister used to live at one time. Go down there you will see the vehicle. Israelis and some local police operate that vehicle,'.
2. This government brought in a vehicle here the number is G-580, it has all sort of electronic gadgets inside of it. It is even being used to jam radio frequency. For example, if they don't want you to listen to my program, they could jam it out. But, they do not do that; what they do is to jam out section of the country at a time. If they do not want the windward side to hear, they stay right in that vehicle G-580".

Upon conviction the appellant was fined $1,500.00 for each offence and sentenced, in default, to imprisonment for 5 months.

[3] At the trial four witnesses testified for the prosecution. These witnesses were the Director of Telecommunication (the director), Mr. Apollo Knights, the head of the National Telecommunication Regulatory Commission, who testified that the vehicle of which the appellant spoke, G580, was not capable of tapping telephones or jamming radio stations; the manager of the security company that secured the vehicle; a police officer who testified to the appellant making the statements for which he was charged; and another police officer who made a tape recording and transcriptions of the appellant's statements.

[4] At the end of the prosecution's case counsel for the appellant made a submission of no case to answer. The magistrate adjourned for decision and on a subsequent day ruled against the submission. After that ruling counsel for the appellant applied for an adjournment on the basis that the appellant had made an application to the High Court for constitutional redress on the ground that section 64 of the Criminal

Code under which the appellant was charged infringed the free speech and the presumption of innocence provisions of the Constitution. The magistrate again adjourned the proceedings and on a later day refused the application for an adjournment. After that ruling counsel for the appellant applied to recall the director. The magistrate ruled that it was not competent for the defence to recall the director to cross- examine him again.

[5] The appellant and one witness then testified for the defence. The witness who testified for the appellant was Mr. Douglas Defrietas, the manager of a radio station and an amateur radio operator for many years, who stated that he did not know what equipment was in the vehicle. He testified that the NTRC had the capacity to listen on the radio frequency spectrum to FM stations and cellular telephones, which use that spectrum, and would be capable of jamming radio stations. The witness accepted that a transmitter would be required to do so. Neither this witness nor any other witness testified that there was any transmitter in the vehicle and, the magistrate therefore found that there was no foundation upon which to assert that the equipment in the vehicle was capable of listening in on the spectrum or jamming out radio stations. She proceeded to convict the appellant. Against his convictions the appellant argued ten grounds of appeal and it is proposed to consider them in turn.

The magistrate erred in refusing to adjourn

[6] The appellant argued that the magistrate was obliged to stay the criminal proceedings after she was informed that the appellant had filed a constitutional application and, in support of that argument, relied on section 16 (3) of the Constitution. That section provides:

> " (3) If in any proceedings in any court (other than the Court of Appeal or the High Court or a court martial) any question arises as to the contravention of any of the provisions of sections 2 to 15 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court

unless, in his opinion, the raising of the question is merely frivolous or vexatious."

[7] According to the written submissions of the appellant it was after the magistrate ruled against him on the no-case submission that the appellant filed his constitutional motion. According to that same source in refusing the application for the adjournment the magistrate stated that the defence had had ample time to file a constitutional motion prior to the commencement of the case. I rely on the appellant's submissions because apparently the magistrate gave no written reasons for her decision not to adjourn. The case of English v Emery Reimbold & Strick Ltd[2] makes the point in relation to civil trials, and I see no reason why the principle may not be applied in a criminal trial, especially to an interlocutory ruling, that a litigant who is not given reasons for a judicial decision suffers no injustice when the reasons for the decision are apparent to the litigant from what occurred in the proceedings. However there is no need to invoke that principle in this case because it readily appears from the statement attributed to the magistrate in the appellant's submissions that the magistrate gave oral reasons and that she must have thought that the filing of the constitutional motion, at that stage of the proceedings, was frivolous or vexatious and that was her reason for refusing to adjourn.It was a view that was clearly open to the magistrate on the facts. The fact that the magistrate did not express herself in the specific language of section 16(3) of the Constitution makes no difference because the reason that she gave was to that effect. I would, therefore, dismiss this ground of appeal.

[8] Any doubt that I may have had on this aspect (and I have none) would be completely removed by the recognition that it does not matter even if the magistrate refused to stay proceedings for some other reason, because the appellant did not pursue the constitutional motion that he filed but, as counsel confirmed to this court, the appellant withdrew his application. Ultimately, therefore, the refusal of the magistrate to stay proceedings to allow the

[2] [2002] 3 All ER 385

constitutional question to be decided by the High Court made no difference to the outcome of the criminal proceedings.

Whether the statements need to be entirely accurate

[9] Under section 64 (2) of the Criminal Code it is a defence for the accused to prove that he took such measures to verify the accuracy of the statement he made as to lead him reasonably to believe that it was true. The appellant relies on the speech of Lord Bridge of Harwich in Hector v Attorney General of Antigua and Barbuda[3] to argue that it is not necessary to succeed on the defence to "first verify the accuracy of all statements of fact on which the criticism was based."[4] The appellant argues that the magistrate should have taken into account this passage in his Lordship's speech in determining whether the section 64(2) defence was made out. Counsel submitted that "the magistrate did not find that all the statements that were made by the appellant to be (sic) false", "she found some to be false [and] accordingly the Hector's (sic) case was applicable."

[10] With respect, I find the argument difficult to follow. First, Lord Bridge did not make the pronouncement that counsel ascribed to him. In the context of considering an offence in section 33B of the Antigua Public Order Act 1972, of printing a false statement which is likely to undermine public confidence in the conduct of public affairs, his Lordship observed that the very purpose of criticism in a democratic society is to undermine public confidence in the stewardship of those who hold office and to persuade the electorate that the opponents would do a better job. Accordingly, he said,[5]

> "it would on any view be a grave impediment to the freedom of the press if those who print, or a fortiori those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based."

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[3] [1990] 2 A.C. 313.
[4] At 318 F
[5] ibid

His Lordship expressly declined to pronounce on the question whether an honest belief on reasonable grounds in the truth of the statement would be a defence.[6] He expressed no view on whether all aspects of the statement made needed to be true. It follows that the case is no authority for the proposition that counsel advanced.

[11] Second, if the substance of the statements that the appellant made was false I do not see that it can matter that every single component was not false. The magistrate conveyed the essence of her fully stated findings of fact in the following summary:

> "The essence and spirit of the statements made confer quite clearly that telephone tapping and jamming radio stations is presently being conducted by G580."

She found that this information was false and determined that the statements made were likely to cause alarm. The obverse of the appellant's contention arises: there is no authority for the proposition that to make out the offence every aspect of the false statement needs to be shown to be false. I can find nothing wrong with this part of the decision and would dismiss this ground of appeal.

Likely to cause alarm

[12] The appellant submitted that the magistrate misdirected herself in relation to whether the false statements were likely to cause alarm. The essence of this submission was that the people of St. Vincent and the Grenadines had become so accustomed to hearing, and presumably reading of, issues concerning telephone tapping that no reasonable person was likely to be alarmed. The magistrate's reasoned decision does not indicate that this contention was made in the magistrate's court but in any event I believe the contention is met by the

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[6] at 318 E.

magistrate's findings on the likelihood of the false statements causing alarm. This is what the magistrate stated:

> "The court considers that the natural and probable result of making a statement stating that telephone tapping is a reality and that jamming radio stations is being conducted through the use of G580 is that any reasonable person in a democratic society would consider that the unqualified assertion that telephone tapping is happening in St. Vincent without any safeguards and that radio stations are being jammed on the basis of a Government's whim is likely to cause alarm. … [T]he court does not have to consider whether the statements have caused or are likely to cause people to protest or take to the streets by rioting or for any individual to say that they were alarmed. The issue is whether the natural and probable result of any right minded person hearing such false statements made by a person holding the position of the chairperson of a political meeting is likely to result in either fright, terror, consternation, apprehension, dread, fear or panic."

[13] A number of newspaper articles on the issue of telephone tapping were produced as exhibits and were relied on by the appellant to show that the issue of telephone tapping had been very much in the public domain in St. Vincent. However, the issues discussed in these articles were whether legislation should be passed to permit telephone tapping and what safeguards would be necessary to make such action acceptable. These articles do not support the argument that the public had become accustomed to the idea that telephone tapping was being conducted (illegally) in St. Vincent. Indeed, the articles would have strengthened in the public mind the idea that there should be no telephone tapping without acceptable safeguards being provided. The statement, therefore, that telephone tapping was then being done, without safeguards having been put in place, was arguably more likely to cause alarm because the public had come to expect that it would not be done without acceptable safeguards being put in place.

[14] A related aspect of this argument for the appellant was that the magistrate should have considered the time, the place, the nature of the words used, the audience and also the prevailing social, political and economic climate in determining whether the statements made were likely to cause alarm in the context of the newspaper articles. This aspect was not separately developed and there is no

need to identify the proposition that, I think, is being implied as to the susceptibility to alarm of persons listening to statements made in the course of a political meeting of the government's opponents. I would also dismiss this ground of appeal.

Evidence of tapping and jamming capability

[15] In assessing the evidence the magistrate rejected the evidence of the witness called for the defence who testified "that the NTRC was capable of listening into the FM spectrum and blocking out radio stations".[7] The magistrate gave as her reason that the witness himself

> "accepted this could only be achieved with the use of a transmitter. No evidence was led by either side to suggest that the vehicle had a transmitter. Further, Mr. Defreitas did not know what equipment was inside the vehicle, had never been inside the vehicle and therefore, in my opinion was unable to speak to the vehicle's capabilities. Therefore, he had no foundation upon which to assert that the NTRC, through the equipment in vehicle G580, were capable of listening in on the spectrum or jamming out radio stations."

[16] What the appellant sought to do on this appeal was to argue against the magistrate's conclusion by reference to the contents of newspaper articles, selected passages from the testimony of the director (who testified that the vehicle did **not** have the capacity to do the things stated), and passages from the testimony of the defence witness. It was an argument based on probabilities and generalities. It was an argument signally incapable of defeating the clear statement by the director, which the magistrate accepted as the fact, that he was involved in the process of deciding what equipment to purchase to place in the vehicle G580 (which is simply a modified Toyota Landcruiser) and that such equipment did not have the capacity to tap telephones or jam radio stations. Counsel for the appellant argued that if the testimony of the witness for the defence "was excluded on the basis that he never went into the vehicle then the same courtesy must be extended to Mr. Knights [the director] who also did not

[7] Reasons for Decision, p. 68 of the record of appeal.

have access to the vehicle and never went into it." This argument overlooks the critical difference that the director decided what equipment to order for the vehicle and therefore could testify to its capacity. It is a point that is dealt with more fully in paragraph 32 of this judgment. There is no basis for upsetting the magistrate's finding of fact and I would dismiss this ground of appeal.

Can the defence recall the prosecution's witness?

[17] The appellant argued that the magistrate erred in law when she refused to allow the defence to recall the director to give evidence. The appellant relied on section 99 of the Criminal Procedure Code[8] which provides:

> "Any court may, either on its own motion or on application (oral or otherwise) of any party to the proceedings, at any stage of an inquiry, trial or other proceedings, summon or call any person as a witness, or recall and re-examine any person already examined, and the court shall summon and examine, or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case."
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> "Provided that the prosecutor of the counsel for the prosecution and the defendant or his counsel shall have the right to cross examine any such person, and the court may adjourn the case for such time (if any) as it thinks necessary to enable such cross examination to be adequately prepared, if, in its opinion either party may be placed at a serious disadvantage."

[18] Counsel for the appellant recognized that the power to recall a witness resided in the court and that the party who desires that it be done is confined to applying to the court to do so. Counsel submitted that

> "the first limb of section 99 acknowledges the significance of the evidence of a material witness. Mr. Knight's evidence is essential to the just decision of the case. He was called by the prosecution to prove the falsity of the statements that were made by the appellant. Therefore, in the absence of his evidence the defence had no case to answer."

[8] Chapter 125 of the Laws of St. Vincent and the Grenadines, Revised Edition,1990

I would accept that as unexceptional. I would not do the same for what immediately followed in the submissions for the appellant:

> "Accordingly, further examination of Mr. Knights was essential to the just decision of the case."

[19] Why? Nothing was advanced before us that showed further examination to be necessary, far less essential. The magistrate's notes of evidence does not show that any reason was advanced before her; all that appears in those notes is what was urged before us, namely, the bare assertion that the defence needed to recall Mr. Knights, without any reason why. Clearly the power contained in section 99 is not to be exercised as a matter of favour or indulgence but as a matter of fairness and justice. So far as the magistrate was concerned and so far as this court was concerned there was nothing from the appellant to enable the court to view his application other than as an attempt to have a second bite at the plum. The magistrate was called upon to exercise her discretion in the context of the particular trial that was being conducted. The prosecution had closed its case; the defence had made its submission and had thereafter made its application for a stay of proceedings, which the magistrate regarded, as I have found, as frivolous or vexatious. It seems to me that in that context the defence needed to provide some tenable basis that called for the discretion to be exercised, at that stage, in its favour. There was no such basis provided. I can see no justification for saying that the magistrate erred in law in the manner that she exercised her discretion and would reject this ground of appeal.

Inspection of the vehicle

[20] Again the discretion of the magistrate is challenged on this ground. The contention is that she erred in law in choosing not to view, inspect and examine the vehicle. With respect, it is a hopeless ground. Counsel has not offered the slightest suggestion of how an inspection of the vehicle could have assisted the magistrate in reaching her decision. In relation to the vehicle there was only one question of fact to be decided and that was whether the equipment that it contained was

capable of tapping telephones and jamming radio stations. The answer to that question, according to the evidence from both sides, depended on what such equipment could do. Unless the magistrate could have answered that question by looking at the equipment in the vehicle a visit to the vehicle would have been an utter waste of judicial time.

Burden of proof

[21] Instead of being required to prove his defence on a balance of probabilities the magistrate ought to have required the appellant only to raise "an issue sufficient to satisfy the court that he took measures to ascertain the accuracy of the statements and which led him to reasonably believe the statements to be true, thus wrongly allowing (sic) the Appellant to prove his innocence." This was how counsel framed his submission on this ground. Counsel relied upon section 8(2) of the Constitution which states:

> "(2) Every person who is charged with a criminal offence … shall be presumed to be innocent until he is proved or has pleaded guilty".

[22] By reference to decisions from a number of commonwealth jurisdictions counsel showed the strong judicial resistance to the erosion of the presumption of innocence and the insistence that the placing of any burden upon the defendant in a criminal trial must in every case strike the right balance between the demands of the general interest of the society and the protection of the fundamental rights of the individual: Vasquez v R[9]; R v Oakes[10]; State v Mbatha[11]; State v Coetzee[12]; R v D.P.P. ex parte Kebeline[13]; R v Whyte[14] and Yearwood v R[15]. The discussion in some of those cases focused on whether the imposition on the defendant of a persuasive burden as opposed to an evidential burden was

[9] [1994] 45 WIR 112
[10] [1997] LRC 477
[11] [1996] 2 LRC 208
[12] [1997]2 LRC 593
[13] [1999] All ER 801
[14] 51 DLR (4th) 481
[15] [2001] 59 WIR 206

compatible with the presumption of innocenceThe approach taken by the Director of Public Prosecutions was that it really did not matter which burden the appellant was required to discharge because whichever it was he had not discharged it.

[23] The appellant advanced his defence under section 64(2), that he took such measures to verify the accuracy of the statements that he made as led him reasonably to believe that they were true, by referring to the newspaper articles that had been admitted in evidence. The magistrate considered the contents of these articles and found that none of them could have led the appellant to believe that the vehicle was being used or could be used to perform telephone tapping or that it was being used or could be used to jam radio stations. Therefore, the magistrate concluded, none of the articles could have reasonably led the appellant to believe that the statements he made were true.

[24] The appellant also advanced his section 64(2) defence by reliance on a three-hour conversation that he testified he held with the Prime Minister. The magistrate stated in her reasons that the contents of that conversation were inadmissible hearsay and the fact that the prosecution had not objected to the admission of the information into evidence did not render the information admissible. The magistrate went on to hold that even if the information was admitted into evidence she would give limited weight and credibility to what the Prime Minister is alleged to have said without testimony from the Prime Minister himself. With this view I must disagree.

[25] The magistrate failed to appreciate the object of the appellant's testimony about his conversation with the Prime Minister. The appellant was not relating the contents of his conversation with the Prime Minister to prove the truth of what the Prime Minister said: if this were what the appellant had been seeking to do the contents of the conversation would indeed have been inadmissible as hearsay. Instead, the appellant was relating the contents of his conversation with the Prime Minister to (1) establish that he took this measure of speaking with the leader of

the country to verify his information and to (2) establish what was the information that he obtained and upon which he acted. It does not matter to his defence whether the information the appellant received was true and it does not matter to the court if it was true. The court was not called upon to determine the truth of the alleged information or to act upon it. The court was called upon to consider what measures the appellant took to verify his information. Certainly if the appellant had testified, and if he had been believed, that the Prime Minister told him that the vehicle was being used for telephone tapping he would have made out his defence, regardless of whether what he had been told was true.

[26] It does not matter, however, that the magistrate wrongly refused to consider the evidence of the appellant's conversation with the Prime Minister and it does not matter that the magistrate, on the alternative footing that the evidence was admissible, wrongly failed to give the evidence of that conversation full weight for the reason that it was not confirmed by its maker. The information that the appellant testified that he got from the Prime Minister was incapable of verifying the accuracy of the statements that the appellant made and was incapable of leading him reasonably to believe that the statements that he made were true.

[27] The information that the appellant obtained from the Prime Minister was recorded in the magistrate's notes of evidence as follows:[16]

> "On December 27, I had three hours of conversation in Georgetown with Prime Minister and we discussed vehicle G580. Prime Minister admitted to me vehicle is there to take care of criminals by listening into radio frequency. He told me besides listening into criminal, when I asked about people's phone being tapped it is for me to guess. From that time I started to put in place certain investigative measures as to what this vehicle is really for. I surfed the net and pull down information on spectrum and these other electronic terms - …"

The fact that the appellant asked the Prime Minister the follow-up question about tapping telephones confirms that the appellant did not understand 'listening into radio frequency' to be synonymous or equivalent to telephone tapping. The

[16] At p. 40 of the record.

appellant does not even make mention of jamming radio stations. Instead of serving to verify the statements that he subsequently made, the appellant's own testimony is that the conversation with the Prime Minister led the appellant to investigate what the vehicle was really for. I find that the information that the appellant obtained from the Prime Minister was incapable of discharging even the evidential burden of raising the issue that the measures that the appellant took could have led him to believe that the statements he made were true.

[28] That conclusion also disposes of the related ground of appeal that the magistrate misdirected herself in ruling that the newspaper articles and the conversation with the Prime Minister could not have led the appellant reasonably to believe that the statements he made were true. As the magistrate correctly stated in her reasons for decision, it was not enough for the appellant to say that he believed the statements were true; he needed to have taken measures to verify the accuracy of the statements as to lead him reasonably to believe them to be true. It is interesting to note that the appellant never said in his testimony that he took steps to verify the accuracy of his statement and that such steps led him to believe the statement to be true. I do not see anything in his testimony from which it can be inferred in his favour that he believed, as a matter of fact rather than as a matter of suspicion, in the truth of what he stated. Indeed, the appellant repeatedly denied that his statements meant that telephone tapping was taking place or that radio stations were being jammed. So he could not have asserted belief in a statement that had that meaning, when he was denying that it had that meaning.

The weight to be given to testimony

[29] In essence the appellant contended that the two persons who were trained to operate the equipment in the vehicle not having been called as witnesses the magistrate ought not to have relied on the testimony of the director. The director had testified that he had not "received hands on training" to operate the equipment in the vehicle and that he did not have access to the vehicle.

[30] As noted earlier, the director was the head of the National Telecommunications Regulatory Commission, which was the body that owned the vehicle and equipment. The evidence was that he held a master's degree in electrical engineering. He said he was quite familiar with the equipment and what it can do. He was involved in the process of deciding what equipment to order for the vehicle. He testified that he was trained to use the equipment in the vehicle. I take this last statement as different from the statement that he had not received 'hands on training', which I understand to refer to training on the specific equipment that was in the vehicle and which the two operators had received.

[31] It seems to me that it was fully open to the magistrate to rely on the evidence of the director that the equipment in the vehicle was not capable of tapping telephones and jamming radio stations. The submission to this court that this evidence was hearsay and ought to have been excluded is simply wrong. If a person orders from a supplier equipment of a type with which he is familiar, and which he knows to be capable of doing certain things and not capable of doing other things, I see no reason why that person should not be able to testify as to the capability of the equipment that he has ordered. The weight to be given to this evidence was a matter for the magistrate. There was no reason why the magistrate ought not to have given full weight to it. I would reject this ground of appeal.

Newspaper article as evidence

[32] The final ground of appeal was that the magistrate misdirected herself as to the information contained in one of the newspaper articles that was admitted into evidence. No time needs to be spent on this ground because I can see no basis for elevating the contents of this article, written by someone who was not called as a witness, which does not say that the vehicle is capable of telephone tapping or

radio station jamming, into evidence capable of contradicting the clear testimony of the director.

Conclusion

[33] In my view none of the grounds of appeal succeeds and I would dismiss the appeal.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

[34] RAWLINS, J.A.: Under a constitution which guarantees freedom of expression, a criminal conviction for utterances, verbal or written, should never be lightly made. There must always be an eye on the constitutional safeguards. In this regard I have agonized over two aspects of this case. One relates to the sufficiency of the evidence in the circumstances of this case. In the end I am satisfied that there is no ground, on the principles, on which this Court can overturn the decision on the finding of facts.

[35] My second concern was with the accuracy of the learned magistrate's statement and finding in relation to the burden of proof upon which the appellant, as defendant in the Magistrate's Court, was required to establish his defence to the charge under section 64(2) of the Criminal Code. This issue was raised in ground 7 of the appeal. It states that the learned magistrate erred in law in misdirecting herself on the burden of proof required by the appellant to establish a section 64(2) defence, in that she required the defendant to prove, on a balance of probabilities as opposed to raising an issue sufficient to satisfy the court, that he

took measures to ascertain the accuracy of the statements which led him reasonably to believe the truth of the statements.

[36] Section 64(2) of the Criminal Code is reproduced in paragraph 1 of this judgment. It is a reverse onus clause, in a manner of speaking. In her reasons for decision, the learned Magistrate stated what this provision requires of a defendant who is charged with criminal libel in order to establish the statutory defence. She stated:[17]

> "There is a statutory defence to the charge under section 64(2) which must be proved on a balance of probabilities. The defence to be proved is that the defendant must show that prior to publication that he took such measures to verify the accuracy of the statement as to lead him reasonably to believe that it was true. This means that the defendant must not only show that he took measures to verify the accuracy of the statement, but that the measures that he took to verify the accuracy of the statement led him to believe that the statement was true. That belief must be a reasonably held belief. It is not enough for the defendant to assert that the measures he took led him to believe the statement was true, but rather that such belief was a reasonable one for him to hold given the measures he took to verify the statement. Therefore, the test of whether his belief was a reasonable belief is an objective one for the court to determine on the hearing of all of the evidence."

[37] The leaned magistrate later considered the evidence which the defendant proferred for his defence. She then concluded as follows:[18]

> "This Court is of the view that the evidence advanced by the defence to establish the section 64(2) statutory defence to be proved on a balance of probabilities was not proved by the defendant since there was no basis upon which he was able to show that he had taken measures to verify the accuracy of the statement so as to lead him reasonably to believe that his statements were true."

[38] Learned Counsel for the defendant submitted that the learned magistrate erred in the manner in which she stated the requirement because she did not interpret section 64(2) in the light of section 8(2)(a) of the Constitution. This latter provision entrenches what is classically referred to as the presumption of innocence, which

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[17] At page 7 of her reasons for decision.
[18] At page 12 of her reasons for decision.

states that every person who is charged with a criminal offence shall be innocent until he is proved or pleads guilty. Learned Counsel submitted that this constitutional protection means that the burden to prove all elements of a charge in a criminal case always remains with the prosecution.

[39] Learned Counsel for the appellant accepted that section 8(12)(a) of the Constitution permits the legislature to make legislation that requires a defendant to prove particular facts. Section 8(12)(a) provides:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of – (a) subsection 2(a) of this section to the extent that the law imposes upon any person charged with a criminal offence the burden of proving particular facts."

[40] Learned Counsel for the appellant submitted, correctly, that this provision does not permit a statutory defence to be read in a manner that emasculates the presumption of innocence. In his view, against this background, the learned magistrate interpreted the section 64(2) defence in a manner that puts the defendant to prove his innocence on a persuasive burden of proof. This, he said, led to the result that the court required the appellant to prove an ultimate fact necessary to determine his innocence, and, accordingly, reversed the burden of proof that is grounded in the presumption of innocence. He insisted that if section 64(2) of the Criminal Code is properly read with section 8(2)(a) and 8(12)(a) of the Constitution, the defendant should have only an evidential burden which requires him merely to adduce evidence sufficient to raise the factual issue under section 64(2) of the Criminal Code, with the persuasive burden reverting to the prosecution to prove or disprove that issue. He cited as authority statements by Lord Jauncey in Vasquez v R.[19] and Dickson J in R. v Oakes.[20]

[41] Counsel submitted that in Oakes, Dickson CJ stated that a provision which requires an accused to disprove the existence of a presumed fact which is an important element of an offence violates the presumption of innocence and, if an

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[19] See per Lord Jauncey in Vasquez v R (1994) 45 WIR 103 at page 113.
[20] [1987] LRC (Const) 477, at page 496.

accused bears such a burden in relation to an important element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. In Vasquez, the Privy Council found that section 116(a) of the Criminal Code of Belize, by placing the burden to prove provocation upon an accused conflicted with the constitutionally entrenched presumption of innocence provided by section 6(3)(a) of the Constitution of Belize,[21] and must therefore be read with such modification to conform with section 6(3)(a). Learned Counsel for the defendant therefore submitted that, on these authorities, the formulation of the burden of proof by the learned magistrate under section 64(2) of the Criminal Code of St. Vincent and the Grenadines imposed a persuasive burden of proof upon the defendant, rather than an evidential burden, and, in effect, amounts to a presumption of guilt, which is inconsistent with section 8(2)(a) of the Constitution.

[42] The resolution of the issue of the reverse burden of proof was helpfully elucidated by the judgment of this Court in Michael Cox and Michael Mitchell v The Queen.[22] The appellants in this case were convicted for knowingly handling controlled drugs which was intended for supply; possession and attempt to export controlled drugs contrary to sections 7, 6(2) and 38(1) of the Drug Abuse (Prevention and Control) Act, 1992,[23] respectively. Sections 42 and 39(1) of this Act contain various reverse onus provisions. Section 42(1)(b) provides that where it is proved that a person had anything containing a controlled drug in his possession, custody or control, it shall be presumed that the person was in possession of the drug until the contrary is proved. Section 42(1)(d) provides that where it is proved that a person handled, within the meaning of section 7, anything containing a controlled drug, it shall be presumed that the drug was contained in that thing, until the contrary is proved. Section 39(2) of the 1992 Act provides that it shall be a defence for a person who is charged with possession to prove that he did not know, suspect or had reason to suspect the existence of some fact alleged

[21] Which is similar to section 8(2)(a) of the Constitution of St. Vincent and the Grenadines.
[22] Grenada Criminal Appeal Nos. 25 and 26 of 1996, 15th September 1997.
[23] Hereinafter referred to as "the 1992 Act".

by the prosecution which it is necessary for the prosecution to prove if the person is to be convicted.

[43] In Cox and Mitchell, Counsel for the appellants cited Oakes as an authority on which they challenged the constitutionality of the reverse onus in the 1992 Act, and the section 42 provisions, in particular. They submitted that they were inconsistent with the constitutional protection of the presumption of innocence.[24] Redhead JA found that the reverse onus provisions of section 42 were not inconsistent with the presumption of innocence. This, he stated, was because section 8(11)(a) of the Constitution, which has a constitutional status equal to that of section 8(2)(a), permits the Legislature to enact legislation that requires an accused person to offer proof, on a balance of probabilities, of essential facts which are rationally open to the accused to prove or disprove.[25] In the judgment of this Court, an important consideration was that under the Act, the prosecution was first required to prove the essential ingredients of the offence charged and then the evidential burden shifted to the accused to disprove in relation to the element for which the statute permitted his defence.

[44] Accordingly, this Court distinguished Oakes because of the absurdity which the reverse onus caused in that case. The Canadian statute required the prosecution to prove possession only. It permitted the defendant to be convicted for possession for the purpose of trafficking unless the defendant proved otherwise that he did not possess the drug for that purpose. In effect, while the prosecution did not have to prove that the defendant possessed for the purpose of trafficking, the defendant had to disprove that he did. Additionally, as Redhead JA, stated,[26] there was no rational connection between the quantity possessed in Oakes and the inference of that possession for the purpose of trafficking. He also reminded us that Viscount Sankey LC stated in Woolmington v Director of Public

[24] Section 8(2)(a) of the Constitution of Grenada. This section and section 8(11)(a) of the Constitution of Grenada are the same as sections 8(2)(a) and 8(12)(a) of the Constitution of St. Vincent and the Grenadines.
[25] See page 12 of the judgment.
[26] From the last paragraph at page 12 to page 13 of the judgment.

Prosecutions[27] that the duty of the prosecution to prove all of the elements of a charge under the presumption of innocence, is subject to the exception as to the defence of insanity and to any statutory exceptions. In Vasquez, therefore, the Privy Council held that section 116(a) of the Criminal Code of Belize was inconsistent with the constitutional protection of the presumption of innocence because it placed the burden to prove provocation upon the defendant.

[45] In the present case, on the other hand, the prosecution had first to prove the elements of the charges. The burden then shifted to the appellant under section 64(2) of the Criminal Code to satisfy the court that he took measures to ascertain the accuracy of the statements which led him reasonably to believe the truth of the statements. I am satisfied, on the authority of the decision of this Court in Cox and Mitchell, that this was to be proof on a balance of probabilities, and, a fortiori, the magistrate did not err in her formulation and application of the burden of proof. In the premises, I agree that the appeal should be dismissed.

Hugh Rawlins
Justice of Appeal

[27] [1935] AC 462, at pages 481-482.