ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL NO.56 OF 2006

BETWEEN:

COMMISSIONER OF POLICE

Appellant

and

ORDAN GRAHAM

Respondent

Before:

The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Ms. Ola Mae Edwards	Justice of appeal [Ag.]
The Hon. Mr. Errol Thomas	Justice of Appeal [Ag.]

Appearances:

Mr. Colin Williams, DPP for the Appellant
Mr. Emery Robertson for the Respondent

2007: October 17;
November 26.

Appeal – appeal by the complainant – appeal by way of case stated – question of law
Sedition – uttering seditious words – possible meaning of the words

Submission of no case to answer – question for magistrate to consider – whether any reasonable tribunal could convict

The complainant appealed against the decision of the magistrate upholding the submission of no case to answer and dismissing the charge of uttering seditious words, contrary to section 53(1)(b) of the Criminal Code. (The words are set out in paragraph 5 of the judgment). Section 212 of the Criminal Procedure Code permits the complainant to appeal by way of case stated. The appellant prepared a notice of appeal that raised a number of questions, under the heading Case Stated, including whether the issue of seditious intent was one for the jury and ought not to have been addressed at the stage of a no case to answer submission, whether the prosecution had to prove intention either expressly or by

inference, whether mere publication was sufficient to create the offence, whether the prosecution needed to specify the impact of the publication and whether the magistrate erred in considering the impact on the doctrine of speech of her decision. The magistrate transmitted this notice of appeal without formulating any question or defining any issue for the determination of the Court of Appeal. In the course of the hearing the appellant clarified that it was the appellant's contention that the magistrate decided the question of fact, in ruling on the submission of no case to answer, whether the words were seditious, and that the magistrate therefore erred in law in deciding this question at that stage of the proceedings.

Held, dismissing the appeal:

(1) The right of appeal by way of case stated given to the complainant by section 212 of the Criminal Procedure Code was confined to appealing on a question of law by way of case stated.

(2) The section required the magistrate and not counsel to state a case. Where both parties were represented by counsel there could be no objection to the magistrate inviting counsel to agree on a draft statement of a case to put before the magistrate for the magistrate to finalize but it remained the duty of the magistrate to state the case to ensure, among other things, that the proper question (or questions) of law arising from the magistrate's decision was (or were) put before the Court of Appeal and that unnecessary or irrelevant issues and argument were excluded both from the court's and the respondent's consideration.

(3) It emerged clearly from the magistrate's written reasons for decision that she considered the correct question to be considered at that stage, namely, whether there was sufficient evidence upon which a reasonable jury properly directed, could convict and it was that question that she answered.

(4) The magistrate's conclusions that the words uttered showed no prima facie evidence of a seditious intention was a decision of a question of law because it amounted to a decision that no magistrate properly directing herself could convict on this evidence and such a conviction would be

perverse. It was the duty of a magistrate to stop such a case from proceeding on a submission of no case to answer.

(5) The burden on the appellant to show that the magistrate was wrong in law was heavier in a case such as this where, if the decision was not a matter of discretion, it was a matter of individual judgment and, therefore, a decision on which reasonable disagreement among judges was possible. An appellate court would not interfere with such a decision, even in a case where all three members of the appellate court would have reached the opposite conclusion. The appellate court would interfere only if the decision was one that no reasonable magistrate could have reached.

JUDGMENT

[1] BARROW, J.A.: This appeal is brought by the prosecution against the decision of the Chief Magistrate upholding a submission of no case to answer on a charge of making use of seditious words. The right of the prosecution to appeal is given in section 212 of the Criminal Procedure Code[1], but the right is qualified by the proviso that in no case shall the complainant appeal from a decision dismissing a complaint except by way of case stated on a point of law.

[2] In the notice of appeal, under a heading "Case Stated", the Director of Public Prosecutions stated five questions that he thought were raised by the magistrate's decision. These included whether the issue of seditious intent was one for the jury and ought not to have been addressed at the stage of a no case to answer submission, whether the prosecution had to prove intention either expressly or by inference, whether mere publication was sufficient to create the offence, whether the prosecution needed to specify the impact of the publication and whether the magistrate erred in considering the impact her decision would have on the doctrine of freedom of speech. The Chief Magistrate seems to have adopted the questions posed by the Director as satisfying the requirement of stating a case because she formulated no question or defined no issue for the determination of this court. It

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

seems to me that the appeal by way of case stated required a somewhat different procedure than what was followed in this case.

[3] In England, the Criminal Procedure Rules 2005[2] contain, in Part 64, a very helpful procedure for appeals by way of case stated that might serve as a guide. The approach contained in those rules accords with the basic proposition contained in the Code that it is for the magistrate to state the case and not counsel. Where both sides are represented by counsel, as in this case, it may be helpful for both sides to agree a draft to put before the magistrate for her to finalize and there can be no objection to the magistrate or her clerk inviting counsel to do so. But it remains the duty of the magistrate to prepare the statement of the case which should set out the charge before the magistrate, the facts as found (or alleged, in a case such as the present where there had as yet been no finding of fact), the submissions of the parties on the no case submission, and the question of law for the determination by this court. Not least among the benefits of having the magistrate state the case is the elimination of unnecessary issues and argument, which formed no part of the magistrate's determination, being placed before the appellate tribunal and being required to be addressed by the respondent.

[4] In the absence of a proper statement of case, we gathered from the Director's written submissions and from his response to the court's inquiry at the beginning of oral argument that the case that this court is required to determine is: did the Chief Magistrate decide the question of law, were the words capable of being found to be seditious words? Or, did she decide the question of fact whether the words were seditious words? The object of the appeal by the prosecution, therefore, was to establish that the Chief Magistrate had jurisdiction, at the no case submission stage, to decide the former but not the latter question and that it was the latter that she decided.

[2] SI 2005 No. 384; reproduced as Appendix 1 in Blackstone's Criminal Practice 2007

[5] The charge against the respondent was that he "did make use of seditious words", being the words reproduced in bold in the passage below, contrary to section 53(1)(b) of the Criminal Code[3]. Seditious words means words having a seditious intention, according to section 51 of the Code, and a seditious intention is an intention to do any of the things listed in section 52 of the Code, the substance of which the Chief Magistrate addressed in the extract from her written decision reproduced in paragraph [7], below. It helps to appreciate the possible meaning of the words to see them in the context in which they were uttered and the full passage in which the respondent used the words complained of is reproduced:

> "… There is only one Minister in the Government of this country, Ralph Gonsalves. For me alone I keep the salaries of the others in Treasury because they not doing anything. He is the only one, every night he is on T.V. He speaks for Education, he speaks for Grenadines Affairs, he speaks for Energy. He speaks for every thing. So, he is the only Minister in the country. He speaks for every one, why? Because **Ralph Gonsalves feels he is the only man with some savvy in this country. We have to reverse that trend. If he do not reverse that trend in this country, you know what would happen here? You know what would happen? Blood would run on the streets of the country.** And don't take that for a joke because what would happen, after all those lands are gone this would cause riot in this country. It would cause riot in this country. So tonight I am sending out an SOS (Save Our State) to the Prime Minister of this country to rethink his policies, to rethink his draconian and wicked policies that he is imposing on our country. **Dr. Ralph Gonsalves I know you would get this tape, Ordan Graham is asking you, begging you to rethink your draconian policies in this country otherwise blood would run in this country, blood would run in this country**..."

[6] At the beginning of her written ruling on the no case to answer submission, the Chief Magistrate identified the question for her decision as whether "there is sufficient evidence upon which a reasonable jury properly directed, could convict." Having set out the legislation, the facts and the law the Chief Magistrate proceeded to apply the law to the facts by first identifying the question for the court to determine as "whether the words in the charge are expressive of a seditious intention as defined in s. 52 to the required burden of proof at this stage." The Chief Magistrate went on to ask the question "So, what is meant by the words

[3] Chapter 124 of the Revised Laws of St. Vincent and the Grenadines, 1990

which form the subject of the charge?" Her worship broke the words down into two parts and held, in relation to the first part, that the words suggested that if the trend of the Prime Minister thinking "he is the only man with some savvy in this country" is not reversed there will be violence in the country. She found that the words in the second part of her analysis constituted an appeal to the Prime Minister to rethink his policies in the country, otherwise there would be violence.

[7] The Chief Magistrate then considered whether the words were expressive of any of 6 species of intent that she set out, the broadest of which extended to raising discontent or disaffection among the people and to bringing the Government into hatred or contempt. The Chief Magistrate then reasoned as follows:

> "Section 52 clearly requires that intention has to be proved either expressly or by inference and it has to be an intention that falls within one of the limbs of S. 52. Counsel for the prosecution was in the Court's opinion, unable to say how these words fell under any of the above limbs. The statement made shows no prima facie evidence of an intention on the part of Mr. Graham to bring hatred or contempt against the Government of St. Vincent, or to incite disaffection, or an intention to incite the people of St. Vincent and the Grenadines to procure the alteration of any matters other than by lawful means [or] an intention to raise discontent among the people, or an intention to incite anyone to commit any crime. The Court is of the view that the words used by Mr. Graham did not come within any of the intentions set out under S. 52. The words used did not establish any prima facie case of an intention to do anything which fell within S. 52[1]. The words intended at best to point out that if certain things did not change or policies not rethought, there would be violence. But this amounts to no more than a statement of opinion."

[8] After commenting that the material words were a statement of criticism of the Government and that the remark about blood running was highly emotive and undoubtedly wild and ill-considered, the Chief Magistrate stated that the words were not of themselves expressive of a seditious intention and that irresponsible words used to criticise the Government of the day without more were not intended by the legislation to constitute sedition. The Chief Magistrate therefore ruled, "no prima facie case is made out that the words are expressive of a seditious intention and the matter is dismissed at this juncture."

[9] Notwithstanding the very full and interesting submissions of the Director it seems to me that what this court is required to do and all that it is appropriate for it to do is to answer the questions stated above: did the Chief Magistrate uphold the no case submission upon the basis, of law, that the words were not capable of being found to be seditious or did she do so on the basis, of fact, that the words were not seditious?

[10] Mr. Robertson, counsel for the respondent, submitted, on the authority of the Practice Direction (Submission of No Case)[4] by Lord Parker CJ, that on a summary trial a magistrate may properly uphold a submission of no case to answer (a) where there has been no evidence to prove an essential element in the alleged offence and (b) when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it. It is not fatal to Mr. Robertson's argument that, notwithstanding his assurance to this court that it was still in force, that Practice Direction was revoked by the Consolidated Criminal Practice Direction: Practice Direction (Criminal Proceedings: Consolidation)[5] because nothing was put in its place.

[11] In drawing attention to that state of the law the authors of Blackstone's Criminal Practice 2007 offer the following opinion:[6]

> "It seems likely that justices will continue to take the view that, if a submission of no case to answer is made, the decision should depend not so much on whether they would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer. The submission should succeed if a conviction would be perverse, in the sense that no reasonable bench could convict."

[12] Both at the beginning and at the end of her written ruling the Chief Magistrate focused on what, therefore, was the correct question, namely, whether there was sufficient evidence upon which a reasonable jury properly directed could convict.

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[4] [1962] 1 WLR 227, [1962] 1 All ER 448
[5] [2002] 1 WLR 2870; [2002] 3 All ER 904
[6] D20.22

She expressly concluded that there was no such evidence. It is therefore the fact that the Chief Magistrate decided a question of law: that the evidence was insufficient to permit a conviction.

[13] At different points in her reasoning the Chief Magistrate posed questions that distinctly seemed to be questions of fact, such as whether the words were expressive of a seditious intent and what was meant by the words. These questions would have been better framed in terms of the capability of the words: were they capable of expressing a seditious intent and were they capable of meaning what the prosecution contended? Although the questions were loosely framed, the reasoning of the Chief magistrate reproduced in paragraph [7] above shows that she answered, and must therefore have considered, the correct question because she twice stated that "the statement made shows no prima facie evidence of an intention … to bring hatred or contempt against the Government" and that "The words used did not establish any prima facie case of an intention to do anything which fell within s. 52 (1)." [Emphasis added] A finding that there is no prima facie case or no prima facie evidence of an essential ingredient of an offence is distinctly a finding of law and a proper one to make at the stage of a no case submission because if there is no prima facie case a magistrate, as a matter of law, cannot convict. Such a conviction would be perverse and it is therefore the duty of the magistrate to stop the case from going any further.

[14] The Director resisted arguing, and his restraint was proper, that it was not open to the Chief Magistrate to reach the conclusion in law that she reached. As that restraint reflects, it does not matter if another judge might have reached the opposite conclusion. An appeal by the prosecution is confined to a question of law, as noted at the outset, and in the particular circumstances of this case the prosecution can only succeed on appeal if it can show that the decision of the Chief Magistrate was wrong, as a matter of law. The burden on the prosecution on an appeal of this nature is even heavier than it would be on a straight question of law because the decision of the Chief Magistrate, if not a matter of discretion, was a matter of individual judgment. It was a decision on which reasonable

disagreement among judges was possible and, as is well established, an appellate court will not interfere with such a decision by a judge. An appellate court will only interfere, especially on an appeal by the prosecution, if the decision was based on an error of principle or was one that no reasonable judge could have reached. A good example of the application of the principle that an appellate court will not interfere with a decision that was fairly open to a judge is the English case of Moghal[7] in which a conviction for murder was upheld on appeal even though all three appeal judges would have exercised the discretion that was impugned – to order separate trials – in the opposite way to the trial judge. Therefore, it does not matter how this court would have decided the question whether the words were capable of proving seditious intent; because the decision that the Chief Magistrate reached was fairly open to her, this court cannot say the Chief Magistrate was wrong.

[15] Accordingly, I would dismiss the appeal. I would not consider the issue whether the intention that the law requires to establish the offence is a subjective or an objective intention, on which the Director thought this court should pronounce. So far as this case is concerned, any pronouncement on that question would be entirely by the way because the Chief Magistrate's finding of law, that the words were not capable of proving a seditious intention, disposes of the issue of intention, regardless of which intention the prosecution would have needed to prove if there had been a case to answer.

Denys Barrow, SC
Justice of Appeal

Ola Mae Edwards
Justice of Appeal [Ag.]

Errol Thomas
Justice of Appeal [Ag.]

[7] (1977) 65 Cr App R 56