J A M A I C A

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO. 132/77

BEFORE: THE HON. MR. JUSTICE HENRY J.A.
THE HON MR. JUSTICE ROBOTHAM J.A.
THE HON. MR. JUSTICE ROWE J.A. (AG.)

R. v. HORACE HARDY HENRY

David Muirhead Q.C. & Dr. L.G. Barnett for Appellant

Ian Forte, Director of Public Prosecutions and Henderson Downer for Crown

November 1 - 4, 7 -11, December 2, 1977

HENRY J.A.

On November 18, 1976 the appellant was convicted by Miss M. Morgan a Resident Magistrate for St. Andrew for conspiracy to contravene Section 2 (1) (a) of the Official Secrets Act 1911. The particulars of the offence were:-

> "Allan Issacs and Horace Hardie-Henry, on divers days between the 24th day of November, 1975, and the 10th day of December, 1975, in the parish of Saint Andrew, conspired together and with certain persons unknown to communicate to other persons not being persons to whom it was in the interest of the State their duty to communicate it, the information contained in the Confidential Cabinet Submission 544/MF-54 BUDGET REVIEW 1975/1976 and Financial Profile 1976/77 which the said Allan Isaacs and Horace Hardie-Henry had obtained by virtue of their office under Her Majesty, namely, Minister of Mining and Natural Resources and Permanent Secretary in the said Ministry."

The appellant who at the time of the alleged offence was the Permanent Secretary in the Ministry of Mining and Natural Resources was jointly charged with Allan Isaacs who was at that time the Minister but the trial ended with the acquittal of Isaacs.

In support of the charge the prosecution led evidence indicating the following sequence of events:-

1. On November 24, 1975 Cabinet Submission M.F-54 was prepared and of the 34 copies duplicated from a stencil 25 were delivered to the Cabinet Office for circulation to members of Cabinet.

2. The submission was intended for Cabinet consideration that same day and copies were therefore laid on the Cabinet table for members attending the meeting.

3. Among the members attending was the Minister of Mining and Natural Resources who at the end of the meeting took with him his copy of the submission.

4. The following morning that copy of the submission (Ex. 3A C.G.) was handed to the appellant who retained possession of it.

5. On Wednesday December 10, 1975 there appeared in the Daily Gleaner a transcript of what was described as "the Ministry (of Finance) Paper which was referred to by the Leader of the Opposition Mr. Edward Seaga in his broadcast on R.J.R. on Monday last."

6. That same day the document from which that transcript was made (Ex. 1) was recovered from the Gleaner Company. It was what the expert witnesses for the Crown opined to be a direct photo-copy of Ex. 3A C.G. made on a copying machine in the office of Consulting Services Ltd., a company whose sole director was Mr. Edward Seaga.

7. On that same day also the Cabinet Secretary on the instructions of the Financial Secretary recalled Cabinet Submission M.F-54, and the request for that recall was communicated to the appellant.

8. The appellant, while admitting that the document was in his possession did not for various reasons which will later be recounted immediately return it and eventually it was returned on the following Monday, December 15, 1975.

The learned Resident Magistrate had before her the documents in question and from her judgment it appears that she quite properly conducted a thorough personal examination of them with a view to deciding whether the opinion of the two expert prosecution witnesses, Superintendent Bloomfield and Mr. Ellen ought to be accepted. These experts conducted independent examinations of all 34 stencilled copies of the submission and of Ex. 1, discovered identifying points of similarity between Ex. 1 and Ex. 3A C.G. which did not appear on the other 33 copies of the Cabinet Submission and concluded that Ex. 1 was a direct photo-copy of Ex. 3A C.G. The learned Resident Magistrate did not accept all the points of similarity described by Superintendent Bloomfield, but although at least one of these appears to be a point also recognised by Mr. Ellen (the other expert), the learned Resident Magistrate nevertheless found that her own

visual examination revealed his conclusions on Ex. 19 (including the rejected point of similarity) were correct. This is on the face of it an inconsistent finding.

The prosecution sought to show by the evidence of Mr. Ellen and Superintendent Bloomfield that Ex. 1 (the Gleaner document) was a photo-copy of a stencilled document. This evidence was not challenged and must have been accepted by the Resident Magistrate. Next the prosecution sought to show that Ex. 1 was a direct photo-copy of a stencilled original in contradistinction to being a copy of a photo-copy. Mr. Ellen gave two reasons for his opinion that Ex. 1 was a direct copy of a stencilled original. Firstly, he said the 813 Xerox machine reduced the copy by some 6% and by measurement Ex. 1 was reduced once only. With this reduction Mr. McDonald, the Xerox expert was in agreement. Secondly, Mr. Ellen said that when a photo-copy is itself photo-copied extraneous marks, e.g. dots and lines which appear on the first photo-copy are doubled in the second photo-copy. Mr. Ellen saw no such doubling of marks and dots on Ex. 1 and so concluded that it was indeed a direct copy of a stencilled original. This evidence of Mr. Ellen was not challenged. Consequently there was evidence on which the Resident Magistrate could find that Ex. 1 was not made from a copy of a photo-copy, if the latter had been made on an 813 Xerox machine.

On examination it is patent that the layout and content of Ex. 1 is identical with that of the 34 stencilled copies of the Cabinet Submission. It would be fanciful to suppose that someone getting hold of a "faired copy" could produce a stencil in every respect identical to one prepared earlier from a draft with multiple corrections. It would be equally fanciful to expect that someone coming into possession of the Cabinet Submission would then have it re-typed so as to exclude the critical words "Cabinet Submission" and then go on to roll off stencil copies and still further to photo-copy one

of those stencilled copies for despatch to the Gleaner. It seems that there was evidence from which an inference was capable of being drawn by the Resident Magistrate that Ex. 1 was reproduced from a stencilled copy prepared from the stencil skin Ex. 2. That being so it was essential for the prosecution to go further and show from which (if any) of the 34 stencilled copies in evidence as Ex. 3 the photo-copy Ex. 1 was made. The evidence of Mr. Ellen and Mr. McDonald was to the effect that Ex. 1 was made from an 813 Xerox machine. Mr. Wynter's evidence was to the effect that having seen Ex. 1 on his desk at the Gleaner Company he spoke to Mr. Seaga and confirmed the authenticity of Ex. 1. There is in the office of Consulting Services Ltd. an 813 Xerox machine. Mr. Seaga is the sole director of that company. Tests carried out by Mr. Ellen and comparisons made by him of photo-copies made from four 813 Xerox machines in the possession of Government departments, led him to the opinion that Ex. 1 was made on the 813 Xerox machine in the office of Consulting Services Ltd. I am of the view that a finding of the Resident Magistrate to this effect is based on credible evidence and is a reasonable one, notwithstanding the submission made on behalf of the appellant that the extraneous marks relied upon by Mr. Ellen for his opinion identify the screen used in conjunction with the machine rather than the machine itself.

The area of greatest importance and in this case of greatest difficulty is the finding of the Resident Magistrate that "there is more than ample evidence that Ex. 1 was photo-copied from Ex. 3A C.G. and I so find as a fact." Although several grounds of appeal were argued before us, to my mind the entire appeal hinges on this one vital issue and on whether the finding of the learned Resident Magistrate on it can be said to be unreasonable. For her conclusions she relied heavily upon the evidence

of Mr. Ellen which she accepted in its totality. Mr. Ellen arrived at his conclusions by a process of visual comparison using magnification where required and as far as comparison was concerned using a comparison microscope. In his process of examination and comparison, Mr. Ellen came upon what he described as certain "accidental marks" produced in the process of duplicating from the stencil skin used to make Ex. 3A C.G. Ex. 1 reflected these accidental marks and none of the other documents examined by Mr. Ellen contained similar accidental marks. As a result Mr. Ellen said, "I can see no practical possibility of the marks which I have pointed out and demonstrated on the chart occurring on another of the duplicating bundle." He went on to say, "If further bundles were made the chances of finding these marks on one of those is so remote that I consider it negligible, that is taking all the marks together."

That is a very powerful opinion and in the absence of any evidence in contradiction, if his evidence was believed and his opinion accepted by the Resident Magistrate as well founded, it was a reasonable basis for her conclusion that Ex. 1 was photo-copied from Ex. 3A C.G. There was however, a most formidable hurdle in the path of the prosecution as when Ex. 1 is inspected it immediately appears that certain words, figures and lines which are on Ex. 3A C.G. do not appear on Ex. 1. Ex. 1 is dissimilar to 3A C.G. in that whereas the following appear on 3A C.G. they do not appear on Ex. 1:-

(a) the words "M.F-54 Cabinet Submission" at the top of page 1.

(b) the word "Confidential" stamped at top and bottom of page 1.

(c) the agenda item "3(2)" written in pencil at top right hand corner of page 1.

(d) a number of vertical lines in the left hand margin some of which touch upon the typewriting on page 1.

(e) a number of horizontal lines underlining the typewriting some of which lines touch upon the typewriting also on page 1.

(f) staple holes appearing on the top left corner of all the several pages of Ex. 3A C.G.

(g) horizontal lines on two other pages of Ex. 3A C.G. which do not appear on Ex. 1.

For Mr. Ellen to maintain his opinion based upon visual examination and comparison that Ex. 1 is a photo-copy of Ex. 3A C.G. he was required to account for the absence of the typewritten words, the stamped words, the pencilled words, the ink lines and staple holes from Ex. 1. He said that there are certain known devices by the aid of which words, figures and marks appearing on the original may be excluded from the photo-copy. One method is by erasing the unwanted portion from the original and then photo-copying the remainder. An examination of Ex. 3A C.G. showed that no erasure or an attempt thereat had been made. Consequently that device could not have been used to produce Ex. 1 in its present form.

The second device was described as masking. Here the copier would place a strip of paper over the unwanted writings or marks before photo-copying and the hidden portions would not be reproduced on the photo-copy. Can the masking be done without leaving tell-tale marks? In his evidence Mr. Ellen said, "Taking the words "Confidential","Cabinet Submission" and "M.F-54" and also the staple marks in document not yet referred to it would be fairly easy to cover these marks in the photo-copying process." Mr. Ellen wished to test his opinion and so he carried out a photo-copying experiment on the Xerox 813 machine which had been at Consulting Services Ltd. at the relevant time and he used Ex. 3A C.G. as his original. In all his experiments shadow lines appeared on the photo-copy indicating that a masking device had been attempted. His inability to get a clean copy ought to have shaken his firm opinion that it would be fairly easy to mask out the disputed writings. Mr. McDonald had a look at Ex. 1 and having seen the

frame lines, gave as his opinion that the 813 a sensitive machine, if able to pick up frame lines would also be expected to pick up the line of the paper used to mask the portion to be obliterated. More than that, Mr. McDonald said he would expect to see staple holes existing on Ex. 34 C.G. reproduced in Ex. 1. Ex. 1 is completely free of shadow marks which would indicate a masking operation and there is no indication of staple holes on any of the pages of that document. Ex. 34 C.G. shows no indication that correcting fluid, another method suggested by Mr. McDonald, was used on it to obliterate words or marks.

Ink marks crossed certain of the typewritten letters on Ex. 1. These ink marks could not be masked without at the same time masking the typescript involved. As the typescript on Ex. 1 is regular throughout, if Ex. 1 had been made from 34 C.G. the copying would have had to be done before the ink marks were made. Mr. Ellen's theory exploded when he experimented. Mr. McDonald was not asked to try and no one with expert knowledge of how an 813 Xerox machine can be adjusted was asked to attempt a demonstration to see if it were possible to produce a clean direct copy without mutilating in any way Ex. 34 C.G. In this state of the evidence the approach of the prosecution, adopted by the learned Resident Magistrate, was that a visual examination and comparison of the documents showed that they corresponded so closely that the inevitable conclusion must be that Ex. 1 was a photo-copy of one of the 34 stencilled copies of the Cabinet Submission; further examination leading to the conclusion that Ex. 34 C.G. must have been the particular one; that being so, some method must have been devised to obliterate the words "M.F-54 Cabinet Submission" which were an intrinsic part of the original stencilled copies and that same method whatever it may have been, must have been used to obliterate the words "CONFIDENTIAL" wherever it appeared. It seems to me that this approach is tantamount to

saying that the similarities between the documents are so great that although no acceptable explanation for the obvious dis-similarities has been given, these dis-similarities can nevertheless be ignored. In my view the prosecution had to establish at the very lowest a credible theory to account for the absence from Ex. 1 of the disputed writings appearing on 3A C.G. before it could be said beyond reasonable doubt that Ex. 1 is a direct copy of 3A C.G. If when all the evidence of the similarities and dis-similarities in relation to the two documents is considered no credible explanation is forthcoming as to how the document Ex. 1 was made, the conclusion that the words: "M.F-54 Cabinet Submission" must have been deleted can only be reached on the assumption that Ex. 1 is a photo-copy of Ex. 3A C.G. The further conclusion that the method used to effect this deletion must also have been used to delete the word "CONFIDENTIAL" is therefore based on this same assumption. It follows that when the prosecution in the course of attempting to prove that Ex. 1 is a photo-copy of Ex. 3A C.G. attempts to explain the dis-similarities between them by putting forward the theory of this unknown method the prosecution is attempting to prove a fact by first assuming that fact to be proved. In my view the finding of the learned Resident Magistrate that Ex. 1 was photo-copied from Ex. 3A C.G., being similarly based on the assumption that that finding is correct, is unreasonable. Since on the prosecution's case that finding is an essential pre-requisite to an adverse verdict against the appellant, it follows that such a verdict is also unreasonable and cannot be upheld. For this reason the appellant is in my view entitled to succeed on grounds 1, 3 and 4 which read as follows:-

1. "The verdict is unreasonable having regard to the evidence.

3. The learned Resident Magistrate erred in law in finding that the appellant was guilty of the offence charged as there was no evidence that he had communicated with, or acted in concert with or agreed with any person or persons who acted in furtherance of a common prior agreement or joint criminal purpose.

4. The learned Resident Magistrate erred in refusing to uphold the submissions of Defence Counsel at the close of the Crown's case that there was no case for the appellant to answer, there being no evidence either directly or inferentially, of a common design by the applicant to carry out or further the purpose of the alleged conspiracy."

In deference to the carefully reasoned arguments and submissions of counsel, however, I propose now to deal with the other grounds of appeal argued before us.

The first ground argued was ground 5 which reads as follows:-

> "The indictment on which the Appellant was convicted is defective in that the section of the Official Secrets Act 1911 referred to therein as creating the alleged offence creates an offence only if the alleged communication is to any person other than:-
>
> (a) a person to whom the person charged is authorised to communicate the matter in question, or
>
> (b) a person to whom it is in the interest of the State his duty to communicate it, -
>
> and the particulars of the indictment only refers to the latter category of persons."

It was the submission of Counsel for the appellant Dr. Barnett (with which Mr. Downer for the prosection agreed) that if it was necessary in a charge for a breach of Section 2 (1) (a) of the Official Secrets Act to plead the exceptions stipulated in that section it was equally necessary to do so in a charge of conspiracy to contravene the provisions of that section. The relevant provisions of the section are as follows:-

> "If any person having in his possession or control any .....document or information.....which he has obtained owing to his position as a person who holds or has held office under His Majesty.....,
>
> (a) communicates the.....document, or information to any person other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it.....,
>
> that person shall be guilty of a misdemeanour."

In considering this ground of appeal it is, I think, necessary to distinguish between the averment in an indictment and the burden of proof of that averment. It is always necessary to state with clarity the offence alleged and there are many cases in which a negative averment although forming an intrinsic element of the offence need not be proved by the prosecution but must be stated in the particulars of offence. Thus in the case of an indictment alleging an offence against the Statute 9 & 10 Will 3, C. 41 Sergeant Hawkins in Hawkins Pleas of the Crown 7th Ed. Vol. 2 C.89 S. 17 p. 460 expressed the view that "although the indictment states that the prisoner 'then or at any time before, not being a contractor with or authorised by the principal officers or commissioners of our said lord the king, of the navy, ordnance or victuallers or victualling office for the use of our said lord the king, to make any stores of war etc.' yet that it is not incumbent on the prosecutors to prove this negative averment, but that it is incumbent on the defendant to show, if the truth be so, that he is within the exception in the statute."

In the instant case Mr. Downer submitted that communication to any person is an offence, but that act is excused if the person to whom the communication is made is within one of the two categories set out. It was therefore his submission that the indictment need do no more than allege the communication although in a case where the prosecution's case was that the person to whom the communication was made did not fall within a particular category the indictment could so state. In either event, he submitted, the onus was on the accused to show that the person to whom the communication was made was within one of the two excepted categories and the accused was entitled to be acquitted upon showing that the person was within either category. He referred to Archbold Criminal Pleading Evidence

and Practice 38th Ed. para. 3232 where the suggested form of indictment reads:-

"Particulars of Offence

A B, on the_____day of_____, being a person holding office under Her Majesty and owing to his office having in his possession a document, namely_____,communicated the same document to_____being a person to whom he was not authorised to communicate it."

In my view the offence created is not communication to any person but communication to a person who does not fall within either of the two categories set out in the section, and the indictment should so state. This was the form of the indictment in R. v. Crisp and Harewood 83 J.P. 121, and unless the form in Archbold intends to use the words "person to whom he was not authorised to communicate it," as a shorthand method of referring to the two categories of excepted persons, in my opinion that form is defective. To my mind the words "other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it...," do not create an "exception or exemption from or qualification to the operation of the statute" which under rule 5 (2) of the Indictment Rules need not be negatived in the particulars of offence. Rather they form an intrinsic part of the offence itself. However, although for the reasons I have attempted to set out the indictment is defective, in my view that defect can be cured by amendment in this court pursuant to Section 302 of the Judicature (Resident Magistrates) Act without injustice to the appellant and I would if necessary have ordered that the particulars of offence in the indictment be amended by inserting next after the word "persons" where it appears for the third time, the words "to whom they were authorised to communicate it, or."

In so far as the question of burden of proof is concerned, I am of the view that following the principles enunciated in R. v. Errington Edwards (1974) 59 Cr. App. R. 213, it lies upon the accused to show that the person to whom the communication was made was within one of the two permissible categories. In that case the appellant was convicted of selling intoxicating liquor without holding a justices' licence authorising such sale, contrary to Section 160 (1) (a) of the Licensing Act, 1964, the prosecution having led no evidence to prove that no justices' licence had been granted to him. In holding that the prosecution was not obliged to lead such evidence the Court observed:-

> "In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities."

In the instant case there was no evidence by the appellant to suggest that if he communicated the information in Ex. 3A C.G. it was to a person to whom he was authorised to communicate it or to whom it was his duty in the interest of the state to communicate it.

Dr. Barnett sought to argue that Cabinet Submissions generally are not necessarily confidential in their nature, that one must examine the particular document for the purpose of determining its confidentiality and that if, as in this case such examination leads to the conclusion that the information it contains is not confidential, one may draw the inference that its disclosure would be authorised or, in the alternative that it would not be contrary to the interest of the state to disclose it. Whatever may be the merits of this argument it is, I think, largely blunted by the

evidence of the appellant which discloses that he at least regarded and treated the document as highly confidential. For these reasons ground 6 ought to fail that ground being as follows:-

> "The learned Resident Magistrate erred in law in finding that the Appellant was guilty of the offence charged in that
>
> (a) it was not alleged or proved that he had conspired to communicate the matter in question to a person to whom he was not authorised to communicate it, and
>
> (b) it was alleged but not proved that he had conspired to communicate it to a person other than a person to whom it is in the interest of the State his duty to communicate it."

Ground 7 was to the following effect:-

> "The learned Resident Magistrate erred in law in upholding the objection to questions by Defence Counsel designed to show that such information as is contained in the Cabinet Submission in question is sometimes or had been communicated to persons outside of the Cabinet and Ministers of Government" - See Notes of Evidence p. 25.

In support of this ground reference was made to the notes of evidence in which the following passage occurs:-

> "Question: Does the Ministry of Finance give information to Bank of Jamaica?
>
> Mr. Kerr objects. -
>
> Objection upheld."

The notes of evidence do not indicate the ground of objection to the question asked or the reason for upholding the objection, but the preceding page of the notes of evidence reveals that the same question in a different form had already been asked twice and answered - in one case following an objection to it. It is reasonable to conclude that the learned Resident Magistrate disallowed the question on the third occasion as being repetitious. This she was entitled to do. In any event there is no indication that Defence Counsel was prevented from establishing if he could that any disclosure by the appellant was either to a person to whom he was authorised to make it or to a person to whom

in the interest of the state it was his duty to make it. In my view this ground also ought to fail.

During the course of the hearing of the appeal we indicated our views in relation to ground 8 but for the purpose of the record I shall restate them. The gravamen of the complaint in this ground was that the statements given by the accused Allan Isaacs ought not to have been admitted in evidence. In our view these statements were not in any event admissible against the appellant. The question of their admissibility generally could only be relevant to the hearing of the appeal if it could be shown that the learned Resident Magistrate had made use of them in coming to her decision in so far as the appellant was concerned. The learned Resident Magistrate was at pains in her judgment to deal first with the appellant although he was not the person first named in the indictment and it is only in relation to the accused Isaacs with whom she subsequently dealt that she referred to the statements. In our view therefore the question of the admissibility generally of the statement did not arise in this appeal.

Finally, I turn to the behaviour of the appellant in relation to the return of Ex. 3A C.G. after its recall by Cabinet. The evidence for the prosecution discloses that the recall was first communicated to the appellant on Wednesday, December 10 at 8.30 - 9.00 a.m. by one Mrs. Rennalls. At that time he said he was going to a meeting with the Minister but would let Mrs. Rennalls have the document that morning. Just before 10.00 a.m. he handed Mrs. Rennalls some Cabinet papers which did not include the requested document. That afternoon Mrs. Rennalls left a note reminding the appellant to return the document and that night she telephoned him at his home for the same purpose. He admitted receiving the note and assured her

that the document was safely locked away with other papers. The following morning the Cabinet Secretary attended in person to collect the document to be told by the appellant that he did not have his keys with him, that he was on the point of leaving for Milk River with the Minister on official business but that he would bring the document next morning. That afternoon Mrs. Rennalls again spoke to the appellant who said he was on his way to a meeting for which he was already late but he had spoken to Mr. Murray (The Cabinet Secretary). On the Friday morning both Mr. Murray and Mrs. Rennalls spoke to the appellant who promised Mr. Murray to take the document to the Cabinet Office when he found it. Later a Police Officer attended the Ministry and found the appellant apparently searching for the document but in vain. That night Mr. Murray received a message from the appellant that the document had been found and it was eventually returned by the Minister on the Monday morning at the request of the appellant. The appellant's evidence is that he had locked away the document with others in a breifcase in a locked cabinet in his ante-room but did not recall until after the visit of the Police Officer where he had placed it. It was argued by the prosecution that this behaviour pointed strongly to guilt and one of the questions I have had to consider is whether it ought to be taken into consideration in relation to what I have earlier described as the vital issue of whether Ex. 1 was a direct photo-copy of Ex. 3A C.G. I have come to the conclusion that although all the evidence would have to be considered in determining the guilt of the appellant, evidence of his behaviour subsequent to the alleged copying of Ex. 3A C.G. would

not be relevant in deciding the fundamental issue of whether Ex. 1 was a direct photo-copy of Ex. 3A C.G.

I would allow the appeal and set aside the conviction and sentence.

I agree

I agree

In the event the appeal is allowed and the conviction and sentence set aside.