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CENTRAL CRIMINAL COURT

No. 841330

B
OLD BAILEY, LONDON, E.C.4.

THURSDAY, 7TH FEBRUARY, 1985.

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B e f o r e

MR. JUSTICE McCOWAN

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R E G I N A

- v -

CLIVE PONTING

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R U L I N G

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MR. R. AMLOT and MR. T. LANGDALE appeared on behalf of the
PROSECUTION.

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MR. B. LAUGHLAND, Q.C. and MR. J. CAPLAN appeared on behalf
the DEFENCE.

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Transcript of the Shorthand Notes of George Walpole & Co.,
Official Shorthand Writers to the Central Criminal Court.

R U L I N G

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MR. JUSTICE MCCOWAN: The Defence now accept that all the ingredients of this charge are established on the evidence before the court, save the last, namely that the Defendant communicated the information in question to a person to whom it was in the interests of the State his duty to communicate it. I have been asked to rule as to what these words mean in law.

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Mr. Caplan for the Defence submits that the Crown must satisfy the Jury that the Defendant did not honestly believe when he communicated the information that it was his duty to communicate it in the interests of the State, regardless of whether it was in fact his duty in the interests of the State. He relies in support of this proposition on the case of Sweet v. Parsley which is reported in 1970 Appeal Cases at page 132 where the House of Lords held that mens rea is an essential ingredient of every offence unless some reason can be found for holding that it is not necessary and that a court ought not to hold that an offence is an absolute one unless it appears that that must have been the intention of Parliament.

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He further submits that in an unreported case of the Queen v. Cairns and Others, being, as I understand it, a prosecution under the same Section as in the present case, Mr. Justice Caulfield directed the Jury in the way that Mr. Caplan submits that I should. In other words, he says that Mr. Justice Caulfield left to the Jury the issue of whether the Defendant in that case honestly believed that he had a duty to communicate the document in question to the other person in the interests of the State.

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I am told, however, by the Crown that in that case Counsel for the Prosecution conceded at the start of the trial that mens rea in that sense was a defence, and that therefore Mr. Justice Caulfield was never asked to form a view on that issue. In consequence the case is not of much assistance to me. On the other hand, there is clear authority the other way.

A In the first place there is the decision of
Mr. Justice Avory in the King v. Crisp and Homewood which
is reported in 83 Justice of the Peace Reports at page 12.
He said: "It should be publicly known that this Statute
absolutely prohibited any person who held office under his
B Majesty from communicating information which he had obtained
owing to that position to any person to whom he was not
authorised to communicate it." Mr. Caplan conceded that
this was against him, but pointed out that decision came
before the House of Lords' decision in Sweet v. Parsley.

C Next there is the decision of the Court of Criminal
Appeal in January 1963 in the case of the Queen v. Fell, a
transcript of which I have been supplied with. This was an
appeal against sentence by a Defendant who had pleaded
guilty to counts under Section 2, Sub-Section (1) of the
Official Secrets Act. Giving the judgment of the court,
D Lord Parker, The Lord Chief Justice, said at 3F of the
transcript: "It must be realised, therefore, that this is
an absolute offence provided that there was no authority to
disclose the document, and provided it was not his or her
duty to communicate it in the interests of the State.
E Accordingly, from the point of view of there being an offence
at all, it matters not what the document contains, what
the motive for disclosure was, or whether the disclosure would
in fact be prejudicial to the State, quite apart from the
safety of the State. In other words, the essence of the
offence is the disclosure of confidential information."

F Mr. Caplan again points out that this is before the
decision in Sweet v. Parsley. He further says that as the
appeal was against sentence only these remarks were overruled
and may well not have been preceded by argument. Nevertheless,
they are strongly persuasive, so Mr. Justice Mars-Jones
G found in the case of the Queen v. Berry at the Central
Criminal Court on the 8th November, 1978, another case under
Section 2, Sub-Section (1) of the Official Secrets Act, when
he ruled against a submission on mens rea similar to that
advanced here by Mr. Caplan.

H It seems to me that Mr. Amlot is right when he contends
that what this Section is concerned with is the preservation

A of information which has been obtained by someone owing to
his position as a person who holds office under Her Majesty.
Such a person is not to pass on that information unless,
B in fact, he is authorised to pass it on to a particular
person, or in fact is under a duty to pass it on to that
other person in the interests of the State. That the person
passing on the information honestly believes that he has a
duty to pass it on in the interests of the State is immaterial,
save on sentence, otherwise any Civil Servant who honestly
believes that the wrong Government is in power, that it would
C be good for the country if they ceased to be and that it would
help the process of evicting them if he leaked one of their
confidential policy documents, would be entitled to be
acquitted.

D I do not for a moment believe that that was the
intention of the legislature. In my judgment no mens rea
is required beyond the intention to communicate the document,
which in this case is not disputed. I therefore reject
Mr. Caplan's argument.

E He turns next to consider what the words, and I quote:
"A person to whom it is in the interests of the State his
duty to communicate it," mean. He submits that the words
"his duty" add nothing to the other words. If that be right,
why are they there? The Section could perfectly properly
read: "A person to whom it is in the interests of the State
to communicate it."

F I feel bound to conclude that the words "his duty"
are not mere surplusage, but are there for a purpose.
Mr. Caplan submitted that if I took this view I should merely
read the words to the Jury without giving them any assistance
as to what they mean.

G Finally he says if I do not think that that is the
proper course I should tell the Jury that they include a
contractual, civic or even a moral duty. Mr. Amlot, on the
other hand, submits the expression "his duty" must in the
context of this Sub-Section be related to the Defendant's
duty as a person holding office under Her Majesty. It must,
he says, be an official duty, a duty imposed upon the
communicator by virtue of his office to communicate it to
H the particular recipient.

A That was a view which appealed to Mr. Justice Mars-Jones in the case of the Queen v. Berry, and I respectfully agree with him.

B As to the remaining words, Mr. Caplan argues that it is for the Jury to decide whether it was in the interests of the State that the Defendant should communicate the documents to Mr. Dalyell, a Back Bench Member of Parliament belonging to the Party in opposition.

C The Prosecution say that the clue to what these words mean is to be found in the speeches of Lords Devlin and Pearce in the case of Chandler v. The Director of Public Prosecutions, which is reported in 46 Criminal Appeal Reports at page 347. That was a prosecution under Section 1, Sub-Section (1) of the Official Secrets Act 1911. I read the material parts of that Sub-Section, and they are: "If any person for any purpose prejudicial to the safety or interests of the State (a) approaches or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act he shall be guilty of felony."

D In his speech Lord Devlin said this, beginning at page 384: "What is meant by 'the State'? Is it the same thing as what I have just called 'the country'? Counsel for the appellants submits that it means the inhabitants of a particular geographical area. I doubt if it ever has as wide a meaning as that. I agree that in an appropriate context the safety and interests of the State might mean simply the public or national safety and interests. But the more precise use of the word 'state,' the use to be expected in a legal context, and the one which I am quite satisfied for reasons which I shall give later was intended in this statute, is to denote the organs of government of a national community. In the United Kingdom, in relation at any rate to the armed forces and to the defence of the realm, that organ is the Crown. So long as the Crown maintains armed forces for the defence of the realm, it cannot be in its interest that any part of them should be immobilised. It is of course arguable that the Crown should not be maintaining the armed forces at all and that the nation would be much safer if the Crown disbanded them. If the

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Crown was given different advice by the same or different ministers, the result might be that its interests might become different from what they now are. But the statute is not concerned with what the interests of the State might be or ought to be, but with what they actually are at the time of the alleged offence."

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A little later on at page 385 Lord Devlin went on: "In my opinion the crucial term in this statute, as applied to this case is not 'purpose' but 'safety and interests of the State.' No doubt the interests of the State ought to be the same as the interests of the community. It would be the claim of those who advise the Crown, that is, the Government of the day, that they are. It is permissible to argue that they are not. Argument of that sort is in comparatively minor matters the stuff of party politics and even in great matters on which substantially the whole country appears to be united, argument is permissible. In such argument 'the State' is used loosely to mean the community; and 'interests' to mean the objects which ought to be secured for the community. Both words have in this statute a more precise meaning. 'Interest' in legal phraseology generally means something concrete, something akin to property, property rights and interests, beneficial interest, insurable interest, controlling interest and so on. In this statute it may well have a wider meaning than that, but it has not the widest possible meaning. If you say that an object is not in a man's best interests, you have in mind what his interests ought to be. If you say that you will protect his interests, you have in mind his interests as they are; you do not make good your word by defeating his objects because you disagree with them. This statute is concerned with the safety and interests of the State and therefore with the objects of State policy, even though, judged sub specie aeternatis, that policy may be wrong. If in this statute these words were given a wider meaning, absurd results would follow. Rebels and high-minded spies could be heard to argue that defeat in battle would serve the best interests of the nation because it would be better off under a different regime. The licence allowed to them would also have to be allowed to

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traitors. This point was dismissed by Counsel for the appellants as theoretical. It was said that no jury would in such circumstances acquit. But even if it be looked at purely on the practical plane, the Judge has to decide whether he will allow hours or days to be spent at the trial in giving an accused the opportunity of expounding his political views. The court is not the forum for such a debate and the jury is not the body to determine what the interests of the State should be."

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I look next at a passage in the speech of Lord Pearce which is to be found at page 392. He said: "I cannot accept the argument that the words 'the interests of the State' in this context mean the interests of the amorphous populace, without regard to the guiding policies of those in authority, and that proof of possible ultimate benefit to the populace may for the purposes of the Act justify an act of spying or sabotage. The protection covers certain specified places which are obviously vital to defence and other places to which the Secretary of State sees fit to extend the protection. Section 3, as amended, includes in prohibited places '(c) any place belonging to or used for the purpose of His Majesty which is for the time being declared by order of a Secretary of State to be a prohibited place for the purposes of this section on the ground that information with respect thereto, or damage thereto, would be useful to an enemy.' Parliament clearly intended to give stringent protection to such places. It is hard to believe that it intended to withhold that protection in all cases where a jury might think that the place in question was not necessary or desirable or where the authorities could not by evidence justify their policies to a jury's satisfaction. Questions of defence policy are vast, complicated, confidential, and wholly unsuited for ventilation before a jury. In such a context the interests of the State must in my judgment mean the interests of the State according to the policies laid down for it by its recognised organs of government and authority, the policies of the State as they are, not as they ought, in the opinion of a jury, to be. Anything which

prejudices those policies is within the meaning of the Act 'prejudicial to the interests of the State.' "

Mr. Amlot points out that the words of the section there being considered were "prejudicial to the interests of the State." The words "his duty" do not figure there. The addition of the words "his duty" in Section 2, Sub-Section (1), he argues, means that the narrow interpretation of the interests of the State, supported by Lords Devlin and Pearce, applies with even greater force in the context of Section 2, Sub-Section (1).

While acknowledging that those passages from those speeches lend support to the Crown's argument, Mr. Caplan says that these were the views of only two of their Lordships. The others either did not address their minds to the question or did not answer it. So he says the views of Lords Devlin and Pearce are not binding on me.

I think he is right about that, but nevertheless I am wholly persuaded by them.

Mr. Caplan accepts that his interpretation is likely to involve the jury in a political debate. I echo the words of Lord Devlin: The court is not the forum for such a debate and the jury is not the body to determine what the interests of the State should be. I accept the view of Lord Pearce that the "interests of the State" must mean the interests of the State according to the policies laid down for or by its recognised organs of government and authority, the policies of the State as they are, not as they ought, in the opinion of the jury, to be. This again was the view of Mr. Justice Mars-Jones in the case of Berry, and I respectfully concur with them.